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No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

ROBERT STENGL, MARTIN GUTENKAUF, ALICE GUTENKAUF, WALTER J. DUTCHAK and GEOFFREY LAGIOIA,

Petitioners,

vs.

VILLAGE OF MORTON GROVE, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether the Second and Fourteenth Amendments bar a municipality from prohibiting the home possession of handguns by the citizenry, and confiscating the same.

2. Whether penumbral privacy, and particularly the "castle doctrine" of the Fourth Amendment, allow a municipality to at once deny responsibility for protecting its residents' homes and prohibit them from possessing the means to do so.

3. Whether the court below should have abstained to allow the determination by the state courts of the state constitutional challenge to the same municipal ordinance.

PARTIES

Appellants-Plaintiffs Below:

Robert Stengl, Martin Gutenkauf, Alice Gutenkauf, Walter J. Dutchak and Geoffrey La Gioia are the only direct parties to this appeal. In the district court their case was consolidated with two others and on appeal the cases were jointly heard. It is our understanding that separate petitions are being filed by the plaintiffs-appellants in those cases.

Appellee-Defendant Below:

Village of Morton Grove, Illinois.

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Petitioners,

vs.

VILLAGE OF MORTON GROVE, ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners ROBERT STENGL, MARTIN GUTENKAUF, ALICE GUTENKAUF, WALTER J. DUTCHAK and GEOFFREY LaGIOIA respectfully pray that a writ of certiorari be issued to review the judgments and opinions of the United States Court of Appeals for the Seventh Circuit and of the United States District Court for the Northern District of Illinois, Eastern Division — both of which are set out in Appendices A and B hereto.

JURISDICTION-CITATION OF OPINIONS BELOW

The district court opinion is reported at 532 F. Supp. 1169, while that of the court of appeals appears at 695 F. 2d 261.

The court of appeals denied our petition for rehearing *en banc* on March 2, 1983 and the court's mandate was returned on March 11, 1983. This petition for certiorari is filed within 90 days of the earlier of those dates. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY AUTHORITY RELIED UPON

Second Amendment

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

Title 10 U.S.C. §311

(a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in Section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard.

(b) The classes of the militia are —
(1) the organized militia, which consists of the National Guard and the Naval Militia; and (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

Morton Grove Ordinance 81-11

Respondent's ordinance is set out in Appendix A hereto as footnote 1 to the court of appeals opinion.

STATEMENT OF THE CASE

On June 8, 1981 the VILLAGE OF MORTON GROVE, ILLINOIS enacted Ordinance No. 81-11 to prohibit and confiscate (with certain minimal exceptions) all handguns possessed in the homes of its civilian residents.[1] Three lawsuits ensued, each challenging the ordinance under both the Second/Fourteenth Amendments and an Illinois constitutional right to arms provision. Although the first of these cases was brought in state court, the VILLAGE removed to federal district court which refused to abstain and/or remand. A second action (hereinafter the *Kalodimos* action) was initiated in state court on purely state grounds, only to have the state court abstain *in deference to the federal court's assumption* of jurisdiction in the first case. Although several of the plaintiffs involved in that action continued it through the state courts,[2] several of the other *Kalodimos* plaintiffs responded by initiating an action in the district court (hereinafter the REICHERT action). Meanwhile petitioners STENGL et al. had initiated an action in the district court which consolidated the three separate actions thus before it.

The district court having upheld ordinance 81-11, all three sets of plaintiffs appealed to the Seventh Circuit which heard the cases jointly. Between them, the REICHERT appellants and the STENGL appellants presented arguments for abstention until the Illinois Supreme Court's decision on the state issue[3] both to the original appellate panel and via a petition for

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1. Morton Grove ordinance 81-11 is reprinted in Appendix at page A-1.

2. The slip opinion on *Kalodimos v. Village of Morton Grove*, Illinois Court of Appeal, Third Division, (February 9, 1983) was made a part of the record on rehearing en banc below by the VILLAGE.

3. See *Harris County Commissioner's Court v. Moore*, 420 U.S. 77 (1975), *Askew v. Hargrave*, 401 U.S. 476 (1971), *Reetz v. Bozanich*, 397 U.S. 82 (1970), *City of Meridian v. Southern Bell Telephone and Telegraph*, 358 U.S. 639 (1959).

rehearing *en banc*.[4] We invite this Court's attention to the abstention issue, but do not argue it since (unless the Court chooses to summarily reverse) the state issue will probably be decided by the state supreme court before this Court can act.

ARGUMENT

Although their opinions extensively reviewed the state issue, neither the district court nor the court of appeals devoted much energy or reflection to resolving the Second Amendment issue. Ostensibly, at least, they said only that they are bound by certain 19th Century cases of this Court which held that no portion of the Bill of Rights (specifically including the First, Second and Fourth Amendments) is binding upon the states.[5] The VILLAGE argues that the Second Amendment merely retrenchs on the powers which the original Constitution (Art. I, Sec. 8, Cls. 15 and 16) had given Congress over the state militia; thus, since it was intended simply to protect the arms of the state militias, it does not apply to the privately owned arms of individuals. Seeing the Amendment as only a protection for the states, the courts below naturally denied that it is a matter of individual liberty which could be incorporated against the states through the Due Process Clause.

I. Although the decision below accords with most modern academic analysis, it conflicts both with the original understanding and the emerging scholarship of the Second Amendment.—

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4. Abstention, of course, may be raised at any stage of a case, by any party or by the court *sua sponte*. *Harris County*, supra 420 U.S. at 82-83, *Colautti v. Franklin*, 439 U.S. 379, n. 9 (1979) and cases there cited.

5. *Presser v. Illinois*, 116 U.S. 252 (1886) (First and Second Amendments inapplicable to states), *Miller v. Texas*, 153 U.S. 535 (1894) (same: Second and Fourth Amendments).

Petitioners STENGL's argument relies upon the emerging scholarship of the Second Amendment, particularly Dr. Joyce Malcolm's seminal work in the English records which has been underwritten by the American Bar Foundation, the National Endowment for the Humanities and Harvard Law School. Unfortunately neither her book nor Prof. Halbrook's are yet in print nor are many of the journals articles we rely upon. All presently unpublished manuscripts will be supplied to the Court on request, however, as they were to the court of appeals.

It deserves special emphasis that we do not at all deny that *one of the Amendment's purposes* was protecting the arms of the militia. Rather we point out that, in the Founding Father's usage, the "militia" encompassed the entire able-bodied male population — and the arms of the militia were those which each person was by law required to own for law-enforcement/military purposes.[6] Since, therefore, the people were the militia and its arms were the ones they individually owned, by guaranteeing their right to keep them the Amendment was guaranteeing both the militia and the individual citizenry against any attempt to disarm them. The legal and philosophical traditions to which the Founders were heir taught them to regard the possession of arms as the insignia of the free citizen,[7] his most basic right-obligation being their use

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6. *United States v. Miller*, 307 U.S. 174, 179 (1939) with emphasis added:

> The signification attributed to the term Militia appears from the debates in the [Constitutional] Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised *all males physically capable of acting in concert for the common defense*...and further, that ordinarily when called for service these men were expected to appear bearing *arms supplied by themselves* and of the kind in common use at the time.

See also note 15 *infra*.

7. In Greek, Roman and English law alike the mark of the *helot* or *metic* was the denial of arms and "the ceremony of freeing a slave included the

to defend his nation, the law and his own liberty and security against aggression — whether by foreign invasion, domestic tyrants, or felonious attackers.[8] It bears emphasis that the possession of arms for defense against foreign enemies and felons was an acknowledged personal right, derivative of the entire corpus of philosophy known to the Founders which regarded self-preservation as the most basic of natural rights.[9] What was philosophically controversial (in the 17th Century, though not to the Founders) was the right Locke and Sidney extrapolated from the acknowledged right of arms possession for self-defense — the right to possess and use arms in self-defense against "enslavement" by tyrants.[10]

Thus petitioners STENGL do not concentrate our argument on the subsidiary question of whether the Amendment is made applicable to the states through the Due Process Clause. If we are correct that the Founders considered the right to arms an essential personal liberty (as did the authors of the 14th Amendment as well[11]), its incorporation against the states

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placing [of arms] in his hands...as a symbol of his new rank." A. V. B. Norman, THE MEDIEVAL SOLDIER 73 (N. Y. Crowell, 1971), W. Blackstone, I COMMENTARIES ON THE LAWS OF ENGLAND, 400.

8. See generally Shalhope, *Ideological Origins of the Second Amendment*, 69 J. AM. HIS. 599 (1982). So deep was the era's attachment to the concept of self-defense that divines taught that it was not just a right but an obligation (to escape the guilt of suicide), while Locke viewed deadly force as proper to repel simple assault. C. Asbury, "The Right to Keep and Bear Arms" (doctoral thesis, History, U. Mich., 1974) 28, 39-40. See treatment of Plato, Cicero, Machiavelli, Hobbes, Locke and Sidney in Halbrook, *The Second Amendment as a Phenomenon of Classical Political Philosophy* forthcoming in D. Kates (ed.) FIREARMS & VIOLENCE: ISSUES OF PUBLIC POLICY (Ballinger, 1983) (hereinafter ISSUES OF PUBLIC POLICY).

9. Blackstone, for instance, considered "having arms for their defense" among the "absolute rights of individuals", because it derived from "the natural right of resistance and self-preservation when the sanctions of society and law are found insufficient to restrain the violence of oppression." I COMMENTARIES 121, 143-144.

10. Halbrook, *supra*.

11. See quotations and analysis in Hardy, *The Second Amendment as a*

necessarily follows under the *Palko*[12] line of cases. It is only because modern courts have taken the view of the Second Amendment urged by the VILLAGE that they have held it inapplicable to the states. J. Nowak, et al. HANDBOOK ON CONSTITUTIONAL LAW 414 (1978).

II. The Second Amendment's text absolutely compels an individual right interpretation —

To conclude that an *exclusively* state's right was intended requires the anomalous assumption that the Framers illadvisedly used the phrase "right of the people" to describe what was being guaranteed when what they actually meant was "right of the states". Moreover, the phrase "the people" appears in four other provisions of the Bills of Rights, always denoting rights pertaining to individuals. So, to justify an exclusively state's right view, the following further anomalies must be indulged: (1) when Madison drafted the Bill of Rights he used "right of the people" in the First Amendment to guarantee a right to individuals (assembly); (2) But, some 16 words later, he used the same phrase in the Second Amendment to denote an exclusively state's right; (3) But then, 46 words later, in the Fourth Amendment he switched "right of the people" back to its normal individual right meaning; (4) It was again used in the normal sense in the Ninth Amendment; and (5) Finally, the Tenth Amendment specifically distinguishes "the states" from "the people". Any one of the textual incongruities demanded by an exclusively state's right position dooms it. Cumulatively they present a truly grotesque reading of the Bill of Rights.

Restraint on State & Federal Firearm Restrictions in D. Kates (ed.) RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT, 180-181 (1979) and Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 GEORGE MASON U. L. REV. 1 (1981).

12. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *Duncan v. Louisiana*, 391 U. S. 145, 148-9 (1968) etc., etc.

Like the modern law review articles from which it derived the exclusively state's right theory, the VILLAGE's briefs below avoid these anomalies by simply ignoring the Amendment's text altogether. Virtually the only exclusively state's right theorist who discusses the actual language at all is Prof. Levin.[13] He argues that in colonial statutory usage "bear arms" referred only to militiamen carrying their arms when mustered out for duty; whereas Blackstone uses the phrase to "have" arms in referring to individual possession of them by right.[13] Remarkably Levin seems to have overlooked the fact that the word the Amendment uses to guarantee the *possession* of arms is "keep", while "bear" refers only to taking them outside the home. Obviously whatever negative pregnant might be inferred as to arms possession, had the Amendment used "bear arms" alone, disappears completely when "to keep" is added.

Had Levin explored the colonial statutory usage of "keep", he would have found his "to bear" argument confirmed, but in a way which completely repudiates his argument as to possession. Smith's much more extensive statutory review, confirms that "bear" was generally used to refer to the carrying of arms by militiamen.[14] Since statutes referring to the carrying of arms by individuals outside the militia context (e.g. statutes forbidding Blacks and Indians to carry arms), invariably used the word "carry", he concludes that the guarantee of bearing arms outside the home was limited to militia service.

In contrast, Smith finds "keep" used in colonial and early state statutes to describe the possession of arms by individuals in all contexts, not just in the course of militia service. Yes,

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13. Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI-KENT L. REV. 148 (1971).

14. James M. Smith, "The Constitutional Right to Keep and Bear Arms" (3rd year thesis, Law, Harvard, 1959) explores every statute related to arms and/or the militia from the first colonial settlement through the First Militia Act (1792). Statutory usage as to both "keep" and "bear" are treated at 42-55.

those subject to militia service (most of the adult male population) were required to "keep" arms in their homes. But so also were seamen, the overaged and others who were exempt from militia service, but still required to have arms for law enforcement and in case of dire emergency.[15] Moreover, what Blacks and Indians (who were emphatically not subject to militia service) were forbidden to do was "keep" arms in their homes. As to the possession of arms by public agencies (not individuals) that was the one context in which "keep" was not used: "only occasionally, and then only in the 17th Century, are towns and colony governments said to 'keep' the public arms."[16]

In short, based on 18th Century usage, Smith concludes that the Amendment's guarantee is plainly individual in nature, and that it extends to the keeping of small arms for any legitimate purpose — but that individuals may carry them outside the home only in the course of militia service.

Additional textual evidence of the unsoundness of the exclusively state's right position is that it renders the phrase "to keep" in "to keep and bear" redundant — as Levin's obliviousness to it unconsciously dramatizes. If the Framers' only concern had been to protect the militia's right to have arms when actually mustered, "to bear" would have sufficed. The words "to keep" take on meaning only if what is being

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15. For instance, THE LAWS AND LIBERTIES OF MASSACHUSETTS 42 (M. Farrard ed. 1929, reprinted from the 1648 ed.) provided: "But all persons exempted whatsoever as foresaid, except Magistrates and Teaching Elders shall be provided of Arms and Ammunition, as other men are." See generally the statutes detailed in THE RIGHT TO KEEP AND BEAR ARMS, a Report of the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, 97th Congress, 2nd Session at 3 (1982) (hereinafter REPORT OF THE SENATE SUBCOMMITTEE ON THE CONSTITUTION).

16. Smith, *supra*, at 49. Public arms which would be distributed to the people when needed were referred to as being "lodged" in public armories.

protected is the individual's own arms, rather than those of the state which would be dispensed to him from an armory whenever the militia was mustered.

Last, but not least, there is the manner in which the Bill of Rights is organized. The rights specifically guaranteed to the people are contained in the first nine Amendments, with the rights reserved to the states being relegated to the Tenth Amendment. If the Framers had viewed the Second Amendment as a right of the states, they would have placed it in the Ninth or Tenth Amendments instead.

III. The legislative history absolutely compels an individual right interpretation of the Second Amendment —

This last point is imperatively reinforced by Madison's intended organization of the Bill of Rights. Not having thought of appending them as amendments to the Constitution as they are now, he proposed to interpolate them after the sections of the original Constitution to which they were most relevant. Had he viewed the right to arms as merely a limitation on Art. I, Section 8's provisions concerning congressional control over the militia, he would have inserted it therein. Instead, he planned to insert it (along with freedom of religion, press and various other personal rights) in Section 9, immediately following clause 3 which establishes the rights against bills of attainder and *ex post facto* laws.[17]

Moreover, Madison's notes of his introductory speech on the amendments (in which the right to arms appeared very early) said that "they relate first to private rights."[18] Nor did his legislative colleagues have any doubt that an individual right

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17. 12 PAPERS OF JAMES MADISON 201.
18. Id.

was involved. Congressman Fisher Ames, for instance, summarized the pending proposals as follows: "The rights of conscience, of bearing arms ... are declared to be inherent in the people."[19] Likewise, writing before the election of the First Congress, James Monroe included "the right to keep and bear arms" in a list of basic "human rights" that he would propose be added to the Constitution.[20]

Apparently the only written interpretative material available to Congress while the amendments were under consideration was a widely reprinted newspaper summary by Madison's correspondent and ally in the preceding struggle for ratification of the Constitution, Tench Coxe.[21] This article, which received Madison's express commendation,[22] flatly stated that "the people are confirmed by [the Second Amendment] in their right to keep and bear their private arms."

The final and conclusive proof that an individual right was intended is that Madison formulated the Amendment in terms which he necessarily knew his contemporaries would interpret as an individual right — as they universally did. As this Court has emphasized,[23] to understand the language of the Constitution it is necessary to bear in mind that the Framers

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19. June 11, 1789 letter to Thomas Dwight, I WORKS OF FISHER AMES 52-53. The next day Senator William Gray wrote Patrick Henry of Madison's introduction of "a string of amendments" which "respected personal liberty." 3 PATRICK HENRY 391 (1951).

20. James Monroe Papers, N. Y. Public Library.

21. Originally published under the pseudonym "A Pennsylvanian", these "Remarks on the First Part of the Amendments to the Federal Constitution" appeared in the PHILADELPHIA FEDERAL GAZETTE (no. 68, v. II, p. 2, col. 1) and PHILADELPHIA EVENING POST for June 18, 1789, and were reprinted by the NEW YORK PACKET on June 23, 1789 at p. 2, col. 1-2 and the BOSTON CENTENEL, for July 4, 1789 at p. 1, col. 2.

22. Coxe sent a copy to Madison who replied commending its "explanatory strictures" of his proposal. June 24, 1789 Letter to Tench Coxe, MADISON PAPERS, *supra*, at 241, n.1.

23. *Ex parte Grossman*, 267 U. S. 87, 109 (1925).

> were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary ... [W]hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they would be shortly and easily understood. [For that reason, t]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.

Reference to the great common law commentators studied by the Framers finds Bracton, Hawkins and Coke all affirming a common law right to possess arms for home defense — while Blackstone included it among his classification of the five "absolute rights of individuals" at common law.[24]

Admittedly this right had been theoretically extinguished for all but the nobility by the hated Game Acts of the Stuart kings whom the Framers so despised. But repeal of that legislation had been part of the Glorious Revolution.[25] Thereafter English court decisions, reports of which were available to the Founders, had recognized that "a man may keep a gun for the defense of his house and family", and denied that the then current Game Acts "prohibit a man from keeping a gun for his necessary defense..."[26] Not only did colonial law allow every

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24. Blackstone, *supra*; 1 W. Hawkins, PLEAS OF THE CROWN, 135 (5 ed. 1771); 3 E. Coke, INSTITUTES 161-162 (5th ed. 1671); and III HENRICI DE BRACTON DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 2, 21, 23, 25 (Twiss ed. 1880 — with alternating Latin and English text).

25. See generally, Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HAST. CONST. L. Q. (1983 — forthcoming) and J. Malcolm, *Disarmed: The Loss of the Right to Bear Arms in Restoration England* (Radcliffe College, 1980).

26. *Rex v. Gardner*, 7 Mod. 279, 280, 87 Eng. Rep. 1240, 1241 (K. B. 1739), *Malloch v. Eastly*, 7 Mod. 482, 489, 87 Eng. Rep. 1370, 1374 (C. P.

trustworthy adult to possess arms, but it deemed this right so sancrosanct that every colony or state had specifically exempted firearms from distraint for execution because of debt.[27]

Given this background, it is inconceivable that Madison and his colleagues of the First Congress would have chosen the language they did for the Amendment unless they intended a personal right. Assume *arguendo* that they had decided (for some unknown reason) not to include the individual right to arms they personally endorsed[28] in the guarantee of arms they were writing into the Constitution. If so, they would never have undertaken to express such an intention in the undefined phrase "right of the people to keep and bear arms" — because they would have known that their contemporaries would have necessarily misinterpreted their intention in terms of the law they knew in the colonies and common law formulations like Blackstone's "absolute rights of individuals."

That, indeed, is precisely how their contemporaries did interpret it. The Second Amendment was analyzed in four legal commentaries, all of them authored by men who were closely acquainted with Madison and/or other members of the First Congress. The earliest of these (by Madison's friend Tench Coxe) has already been quoted. Next came the 1803 American

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1744). Smith, *supra*, 63-64 finds that *Gardner* was reprinted in a book circulated in the Colonies which was part of the law library of John Adams.

27. Smith, *supra*, at 34.

28. Although space does not permit reproducing them here, our opening brief in the Court of Appeals set out such statements in the most enthusiastic terms from Thomas Jefferson ("one loves to possess arms"), Patrick Henry ("Every one who is able may have a gun"), George Washington, James Madison, George Mason, Richard Henry Lee, Sam Adams, John Adams and Noah Webster, among others. Many of these are cited in REPORT OF THE SENATE SUBCOMMITTEE ON THE CONSTITUTION, supra 4-7, Halbrook, *To Keep and Bear "Their Private Arms": The Adoption of the Second Amendment, 1787-1791*, 10 N. KY. L. Rev. 13 (1982).

edition of Blackstone by St. George Tucker, of justice of the Virginia Supreme Court, an intimate of Madison and Jefferson, the brother of one member of the First Congress and the best friend of another.[29] Tucker annotated Blackstone's analysis of the "absolute rights of individuals" to possess firearms in England, with the observation that in America this common law right had been enunciated and guaranteed by the Second Amendment.[30]

Next comes the first comprehensive commentary on the new federal Constitution, written by William Rawle to whom Washington had offered the first Attorney Generalship.[31] So far was Rawle from the states' right concept, that he flatly declared that the Second Amendment prohibited state, as well as federal, laws disarming individuals.[32] Last, but surely not least, are the COMMENTARIES ON THE CONSTITUTION of Mr. Justice Story, a younger contemporary of the Founders and a Jefferson appointee to the United States Supreme Court. He eulogized "*the right of the citizens* to keep and bear arms" as "the palladium of the liberties of a republic."[33]

If, as this Court has suggested (*Powell v. McCormack*, 395 U. S. 486, 547) authorities that are closest to the time of enactment are of most value in understanding the original meaning of constitutional provisions, the exclusively state's right theory cannot survive the fact that it is exclusively a product of the 20th Century, of which neither the Framers nor any 18th or

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29. M. Coleman, ST. GEORGE TUCKER, CITIZEN OF NO MEAN CITY 35, 87, 113-114, 124; REPORT OF THE SENATE SUBCOMMITTEE ON THE CONSTITUTION, supra 7.

30. St. George Tucker, BLACKSTONE'S COMMENTARIES, WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT (etc.) 143, n. 40 and 300 (1803).

31. D. Brown, EULOGIUM UPON WILLIAM RAWLE 8-9, 15, 38 (1837).

32. W. Rawle, A VIEW OF THE CONSTITUTION 125-126 (2d ed. 1829).

33. J. Story, COMMENTARIES ON THE CONSTITUTION 746 (1833), emphasis added.

19th Century commentator or court had the slightest intimation.[34]

IV. This Court has recognized that the Second Amendment guarantees an individual right —.

Respondent and the courts below emphasized that *U.S. v. Miller*, 307 U. S. 174, 179 (1939), in rejecting the claim that legislation prohibiting sawed-off shotguns is unconstitutional on its face, said:

> With obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view.

But this can only be understood in light of what this Court there held the "militia" to be — in the nearly 50% of the opinion which is devoted to defining it. Contrary to respondent's assumption that "militia" in 18th Century usage meant an organized military unit as it does today,

> The signification attributed to the term Militia appears from the debates in the [Constitutional] Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly

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34. Between them, our and the REICHERT briefs in the Court of Appeals *cited some 22 state cases, and five from this Court*, spanning the period 1822-1903, all of which construed either the Second Amendment or a comparable state constitutional provision as creating a right which individuals could invoke. The first case to invoke the "collective" or state's right theory is *City of Salina v. Blaksely*, 83 Pac. 61 (1905), construing a state constitutional provision in a way which virtually no other state court has followed. Caplan *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, 1982 DETROIT COLL. OF LAW REV. 791.

> enough that the Militia comprised *all males physically capable of acting in concert* for the common defense...and further, that ordinarily when called for service these men were expected to appear *bearing arms supplied by themselves* and of the kind in common use at the time. [307 U.S. at 179, emphasis added.]

Far from holding that Mr. Miller, as an ordinary citizen, could not invoke the Amendment's protection, this Court recognized that he could — without proof of any connection to the National Guard or some comparable state organization. What this Court focused on was only the weapon itself, citing a state case which had held that the individual, to be protected, must demonstrate it to be a militia-type weapon:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than 18 inches in length" at this time has some reasonable relationship to the preservation of the efficiency of a well regulated militia, we cannot say that the second amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State*, 2 Humphreys, Tenn. 154, 158. [Id. at 178]

Thus, even as it recognized an individual right to arms, *Miller* established the limitation that the weapon must be suitable for militia purposes. Of course, it is common knowledge that handguns *per se* are "part of the ordinary military equipment" (307 U.S. at 178). This is judicially noticable since it is easily verifiable by unimpeachable reference works.[35]

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35. See, e.g. I Hogg and J. Weeks, MILITARY SMALL ARMS OF THE 20TH CENTURY London: Arms & Armour Press, 1973) (devoting 39 pages

V. The Amendment is not obsolete nor (if it were) would it be the prerogative of the judiciary to read it out of the Constitution by refusing to enforce it —

It has been argued that popular possession of arms is useless for self-defense, or as a resource against either foreign attack or domestic tyranny.[36] If this is true we wonder how it came to be that the British no longer rule in Israel and Ireland, nor Generals Somoza and Bautista in Nicaragua and Cuba, respectively, nor the Shah in Iran; how the French lost Indo-China, Algeria and Madagascar; and the Portugese lost Angola.[37] The notion that modern military technology has rendered tyrants impervious to popular revolution can only be based upon the gratuitous assumption that handgun-armed citizens will eschew guerrilla warfare in favor of throwing themselves headlong under the tracks of advancing tanks. For, in the vast majority of instances, 20th Century military establishments have been unable to suppress guerrillas who started out with only small arms, *viz* our experience against the Viet Cong and the Soviet's experience in Afghanistan. (Note that it is quite irrelevant for our purposes whether each of the struggles mentioned is or was justified or the people benefited therefrom. However one may appraise these victories, the fact remains

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to the handguns adopted as standard by various nations' armed forces), Levy, GUERRILLA WARFARE 55 (Penguin & Infantry Journal, 1942), (a manual distributed en mass by the War Department, recommending the keeping of "weapons which a guerrilla in civilian clothes can carry without attracting attention. They must be easily portable and easily concealed. First among these is the pistol.").

36. See e.g. Clark, *Reducing Firearms Availability: Constitutional Impediments to Effective Legislation and an Agenda for Research*, forthcoming in ISSUES OF PUBLIC POLICY, *supra*.

37. Kessler, *Gun Control and Political Power*, 5 LAW & POLICY QUARTERLY #3 (July, 1983), Marina, *Weapons, Technology and Legitimacy: The Second Amendment in Global Perspective* forthcoming in ISSUES OF PUBLIC POLICY, *supra*.

that they were achieved against regimes equipped with all the military technology which, it is asserted, inevitably dooms popular revolt.)

Moreover, in a free country like our own the issue is not overthrowing tyranny, but deterring it. To persuade his officers and men to follow him, a potential military despot must be able to convince them that his rule can meet the nation's problems better than a democratic government, which needs a consensus within a widely divergent citizenry before it can act decisively. But when that widely divergent citizenry possesses upwards of 160 million firearms the outcome of any usurpation (no matter how initially successful) is likely to be savage and prolonged civil war, rather than a benevolent dictatorship:[38]

> A general may have pipe dreams of a sudden and peaceful takeover and a nation moving confidently forward, united under his direction. But the realistic general will remember the actual fruits of civil war — shattered cities like Hue, Beirut, and Belfast, devastated countrysides like the Mekong Delta, Cypress and southern Lebanon.

Even if his ambition does not recoil from the prospect of victory at such cost, will his officers and men accept it? Moreover, he and they must also evaluate its effect in leaving the country vulnerable to the very foreign enemies their coup is designed to unite the country against. Because it leads any prospective dictator to think through such questions, the individual, anonymous ownership of firearms is still a deterrent today to the despotism it was originally intended to obviate. While our government has a "quite good record of exerting power without abusing it...the deterrent effect of an armed citizenry is

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38. Hardy, *supra*, at 184-185.

one little recognized factor that may have contributed to this."[39] In the words of the late Senator Hubert Humphrey:

> The right of citizens to bear arms is just one more guarantee against arbitrary government, one more safeguard against a tyranny which now appears remote in America, but which historically has proved to be always possible.[40]

As to the national defense value today of a popular militia, for constitutional purposes the issue appears to have been resolved by Congress. Congress has determined that it remains necessary to classify the entire able-bodied male population aged 17-45 as the "unorganized militia" of the United States, subject to a potential call to arms in the case of dire military emergency. 10 U.S.C. §311. Moreover, the recent military history of the United States shows militia units so composed making definite, though minor, military contributions.[41]

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39. Id.

40. Id.

41. As late as Pearl Harbor a military emergency was deemed to require mustering individually armed citizens. Because available military personnel were insufficient to repel the Japanese invasion that seemed imminent, the Governor of Hawaii called upon citizens to man check points and patrol remote beach areas. (Ironically many of those responding were Japanese-Americans whose colleagues in California were soon to be imprisoned without benefit of trial or habeas corpus.) Across the country the unorganized militia proved a successful substitute for the National Guard, which was federalized and activated for overseas duty. U. S. HOME DEFENSE FORCES STUDY, p. 32, 34 (Office of the Assistant Secretary of Defense, March 1981). Members of the unorganized militia, many of whom belonged to gun clubs and whose ages varied from 16 to 65, served without pay and provided their own arms. Id. at 58, 62-63. The U. S. government, however, not only could not supply sufficient arms to the militia but "turned out to be an Indian giver" by recalling rifles. M. Schlegel, VIRGINIA ON GUARD at 131 (Va. State Lib. 1949). In Virginia, "since its personnel would have to furnish its own weapons and ammunition, [the militia's] membership campaign leaned heavily on sportsmen of the state." Schlegel at 129.

Finally, arguments as to whether the Amendment is obsolete are of, at most, tangential import to its proper interpretion by the courts. After all, the Second Amendment is not the only provision of the Bill of Rights which is assertedly obsolete (or with which some people today just happen to disagree). A judge may be absolutely convinced that the premise of free will which underlies the First Amendment has been invalidated by modern psychological techniques like brainwashing. Yet so long as the First Amendment stands he cannot commit a young person, who has allegedly been brainwashed by a "cult" to abandon the beliefs and lifestyle of his parents,into the custody of a "deprogrammer."[42] Likewise the Seventh Amendment clearly is obsolete, at least insofar as it requires jury trials in civil cases exceeding $20.00 in controversy. Nevertheless this Court continues faithfully to apply that Amendment's dictate in all cases fairly covered by its literal wording and original spirit.

Though courts sometimes give constitutional rights *additional* scope in order to effectuate what is deemed to be their original intent, courts have no authority to reduce or eliminate the plain terms of a constitutional guarantee because they disagree with its intent or view it as obsolete. The duty of the courts is to enforce the Constitution, not to arrogate to themselves the power to delete its provisions. The power to withdraw a right explicitly guaranteed to the people is reserved to their state and federal legislatures in a process which is ornately hedged around with safeguards, not the least of which is its protracted length.

Rep. of Adj. Gen. (VA) 12 (1942). The 15,000 volunteer Maryland Minute Men brought their own rifles, shotguns, pistols to musters. Baker, *I Remember — "The Army" With Men From 16 to 79*, (BALTIMORE) SUN MAG. 46 (Nov. 16, 1975).

42. See, e.g. *Rankin v. Howard*, 633 F. 2d 844 (9 Cir., 1980).

VI. Ordinance 81-11 violates the "castle doctrine" which is central to the Fourth Amendment and penumbral to several others —

Privacy of home and family enjoy a peculiar sanctity under our Constitution. *Griswold v. Connecticut*, 381 U.S. 479 (1965), *United States v. Orito*, 413 U.S. 139, 142 (1973) ("The Constitution extends special safeguards to the privacy of the home", protecting there a multitude of things which might be prohibited in other contexts). Thus in "a reaffirmation that 'a man's home is his castle'", persons may possess therein pornography which, outside the home, enjoys no constitutional protection. *Stanley v. Georgia*, 394 U.S. 557 (1969), *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 66 (1973).

A fortiori the home possession of handguns for the purpose of home defense. Not only are they directly relevant to home privacy (as pornography is not) but application of the castle doctrine to them involves no more than tracing that doctrine to its roots. For it originated — and was known to the Founding Fathers — in the context of a right to possess and use arms in the home defense. Cf. *Payton v. New York*, 445 U.S. 573, n. 44 (1980), quoting *Semayne's Case*, 5 Coke Rep. 91a (1603).

The familiar maxim expressing the castle doctrine originated in a case cited in *Semayne* (see *Payton* n. 44: *Anonymous*, 21 Hen. VII, fol. 39, pl. 50), holding that a householder could not only defend himself with deadly force, but could assemble an armed multitude to assist him because "a man's house is his castle and his defense, and where he has a peculiar right to stay, etc."[43] Naturally a right to use deadly

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43. Earlier cases included *Dhutti's Case*, Northumberland Assize Rolls (1255), 88 Publications of Surtees Society 94 (1891) (household servant privileged to kill nocturnal intruder); *Rex v. Compton*, 22 *Liber Assisarum* pl. 55 (1347) (homicide of burglar is no less justifiable than of criminal who resists arrest under warrant); and *Anonymous* 1353, 26 *Liber Assisarum*, (Edw. III), fol. 123, pl. 23. (householder privileged to kill arsonist).

force in defense of the castle implied a right to possess deadly weapons there. Thus Bracton declared that, while "a person may not walk about with arms whenever he pleases without some cause", if assailed at home, "he may resist with his utmost strength, with arms or without . . ." IV DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE fol. 162b. (3 Twiss transl. 23, 1880). Likewise Coke emphasized that the Statute of Northhampton, which prohibited the carrying of arms, did not apply to their possession in the home[44]

> for where shall a man be safe, if it not be in his house? And in this sense it is truly said *Armaque in armatos sumere jura sinunt* [The laws permit taking up arms against armed persons.].

Stanley proscribes laws entering the home to forbid possession of pornography there. How then can an ordinance enter it to strip the householder of his means of protecting it — protection which the Village has neither the necessary resources nor legal liability to provide?[45] As *Payton* notes in quoting *Semayne's* case:

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44. 3 E. Coke, INSTITUTES 162 (5th ed., 1671).

45. Cf. 85 Ill. Rev. Stat. 4-102 immunizing municipalities "for failure to prevent the commission of crimes and failure to apprehend criminals." See, e.g. *Jamison v. City of Chicago*, 48 Ill. App. 3d 567, (1977). Compare *Warren v. District of Columbia*, 444 A.2d 1 (1981) (no liability where, as a result of police failure to respond to repeated phone calls that burglars had broken in: "for the next fourteen hours the [plaintiffs] were held captive, raped, robbed, beaten, forced to commit sexual acts upon each other, and made to submit to the sexual demands of" their attackers).

Immunization from police liability for failure to protect results from the simple fact that police resources are insufficient to provide *direct* protection to citizens. Resources barely suffice to *deter* crime through preventive patrol and subsequent apprehension. Even with special "911" dialing, police response time is inadequate to apprehend crime perpetrators — much less to protect victims. W. Spellman, D. Brown, CALLING THE POLICE xxiii (Police Exec. Res. Forum, 1980) ("When reported within a few seconds, the chances of response-related arrest were about 18 percent;

> The zealous and frequent repetition of the [castle doctrine maxim] made it abundantly clear that both England and in the Colonies "the freedom of one's house" was one of the most vital elements of English liberty [445 U.S. at 596-597].

Note: we recognize that the wisdom of the castle doctrine is challenged by the claim that firearms are useless for self-defense. Even if more recent scholarship did not tend to validate the self defense and crime deterrence value of handgun ownership[46], the wisdom of the Bill of Rights is not open to judicial review.

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if reported 60 seconds after the crime, the chances are only about 10 percent.")

California State University criminologist A.C. Germann notes that "the public has been duped into thinking that the police, unilaterally, can provide a crime-free community." *Police Partnership*, CALIFORNIA JOURNAL, November 1982. It is scarcely less true for us than it was for the Founders that the individual depends upon himself for the defense of his own home.

46. One study purports to prove that six times as many Cleveland householders died in gun accidents as killed burglars. This has now been discredited because of massive statistical error. See discussion in "The Ownership of Firearms for Reasons of Self-Defense," a paper delivered by Prof. James Wright to the 1981 annual meeting of the American Society of Criminology.

It had been noted that few householders killed burglars (or *vice versa*) in Los Angeles and Detroit in the early 1960's. G. Newton and F. Zimring, FIREARMS AND VIOLENCE IN AMERICAN LIFE, 62-3 (1970). But more recent and comprehensive statistics tell a different story: In 1981 California civilians justifiably killed almost twice as many burglars, rapists and other violent felons as did police. Bureau of Criminal Statistics, HOMICIDE IN CALIFORNIA, 1981, 35-6 and tables 58-65 (California Dept. of Justice). Miami has the same ratio (*Omaha World Herald*, Oct. 20, 1982, p. 2); while in Chicago and Cleveland civilians kill three times as many felons as do police. D. Kates, RESTRICTING HANDGUNS, *supra*, 156; Rushforth, et al. *Violent Death in a Metropolitan County — Changing Patterns in Homicide (1958-1974)*, 297 NEW ENGLAND J. MED. 531 (1977). For similar statistics for Houston-Dallas and New York; see *New York Times*, Nov. 21, 1982: "Shootings by Civilians Rise Sharply."

Nor can it be claimed that the castle doctrine allows a handgun ban which leaves still long guns for home defense. Such a distinction bears no relationship to the "freedom of one's house" rationale. *Stanley*, for instance, would prevent enforcement in the home of laws preventing the possession of one particular kind of pornography (e.g. homosexual) — regardless of whether home possession of other kinds of pornography was permitted.[47]

Also of interest may be Orlando, Florida's one year experiment with a highly publicized program in which 3,000 civilian women received handgun self defense training. In the succeding year rape dropped by nearly 90%, burglary and aggravated assault by 24% and 25% respectively — making Orlando the only city of more than 100,000 in the country to experience a reduction in violent crime. Kates, *supra*, at 167. After five years rape in Orlando was still down 13% while it had risen 300% in the surrounding area. Compare FBI UNIFORM CRIME REPORTS 1966: 85 and 172 to 1967: 179, to 1972: 88 and 199. These and other statistics directly relevant to this case (crime rose sharply in Morton Grove after the ban while it has dropped by 73% in Kennesaw, GA., after that town required every household to have a gun) are discussed in Kleck & Bordua, *The Factual Foundations of Gun Control*, 5 LAW & POLICY Q. #3 (July, 1983).

47. Indeed, it is not handguns but long guns which, in an urban environment at least, fail to meet the common law criteria of being usable for home defense without posing an unreasonable danger of injury to innocent third parties. Even if a shot from a handgun misses a burglar it will end up in the wall — unlike a shotgun blast which will penetrate all the way through, endangering other family members or neighbors. (And a rifle used in home defense would be capable of doing that even after actually striking the burglar and penetrating all the way through him.) Moreover, the danger of accidental fatality enormously increases when handguns kept for home defense are replaced by long guns (weapons which even now are involved in 90% of all accidental firearms fatalities, though they probably constitute less than 10% of the weapons kept loaded at any one time). Kates, *Points of Comparison Between Banning the Handgun and Prohibition of Liquor*, a paper delivered to the 1981 annual meeting of the American Society of Criminology.

The dangers implicit in discharging a long gun at a rapist or other burglar in an urban environment are so substantial that civil or even criminal liability for recklessness might well follow. W. La Fave and A. Scott CRIMINAL LAW 396. Thus, the castle doctrine embraces the right to opt for

CONCLUSION

For the foregoing reasons we believe that this Court should hear the issues involved in this case.

Date: May 25,1983

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handguns instead of long guns as home defense weapons. Compare *Metromedia v. San Diego*, 453 U.S. 490 (1981) (availability of other media for political and social expression cannot justify prohibition of billboards), *Lovell v. Griffin*, 303 U.S. 444 (1938) (same: leafletting).

APPENDICES INDEX

A: U.S. Court of Appeals, 7th Cir.; Decision (Dec. 6, 1982); *Quilici, Stengl, et al., Reichert and Metler v. Village of Morton Grove.*

B: U.S. Dist. Court, Northern Dist. Ill.; Memorandum opinion and order (Dec. 29, 1981); *Quilici, et al. v. Village of Morton Grove.*

C: U.S. Court of Appeals, 7th Cir.; Judgment—Oral Argument (Dec. 6, 1982); *Quilici, et al. v. Village of Morton Grove.*

D: U.S. Court of Appeals, 7th Cir.; Order Amendment (Dec. 10, 1982); *Quilici, et al. v. Village of Morton Grove.*

E: U.S. Court of Appeals, 7th Cir.; *en banc* rehearing denied (Mar. 2, 1983); *Quilici, et al. v. Village of Morton Grove.*

F: U.S. Court of Appeals, 7th Cir.; Mandate and record letter (Mar. 11, 1983); *Quilici, et al. v. Village of Morton Grove.*

G: U.S. Dist. Court, Northern Dist. Ill.; Judgment order (Dec. 29, 1981); *Quilici, et al. v. Village of Morton Grove.*

Appendix A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 82-1045, 82-1076 & 82-1132

VICTOR D. QUILICI, ROBERT STENGL, et al., GEORGE L. REICHERT, and ROBERT E. METLER,

Plaintiffs-Appellants,

v.

VILLAGE OF MORTON GROVE, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 81 C 3432, 81 C 4086 & 81 C 5071—**Bernard M. Decker**, *Judge.*

ARGUED MAY 28, 1982—DECIDED DECEMBER 6, 1982

Before BAUER, WOOD, and COFFEY, *Circuit Judges.*

BAUER, *Circuit Judge.* This appeal concerns the constitutionality of the Village of Morton Grove's Ordinance No. 81-11,[1] which prohibits the possession of handguns

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[1] Ordinance No. 81-11, in pertinent part, provides:

AN ORDINANCE REGULATING THE POSSESSION OF FIREARMS AND OTHER DANGEROUS WEAPONS

Whereas, it has been determined that in order to promote and protect the health and safety and welfare of the public it is necessary to regulate the possession of firearms and other dangerous weapons, and

(Footnote continued on following page)

[1] *continued*

Whereas, the Corporate Authorities of the Village of Morton Grove have found and determined that the easy and convenient availability of certain types of firearms and weapons have increased the potentiality of firearm related deaths and injuries, and

Whereas, handguns play a major role in the commission of homicide, aggravated assault, and armed robbery, and accidental injury and death.

NOW, THEREFORE, BE IT ORDAINED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF MORTON GROVE, COOK COUNTY, ILLINOIS, AS FOLLOWS:

SECTION 1: The Corporate Authorities do hereby incorporate the foregoing WHEREAS clauses into the Ordinance, thereby making the findings as hereinabove set forth.

SECTION 2: That Chapter 132 of the Code of Ordinances of the Village of Morton Grove be and is hereby amended by the addition of the following section:

"*Section* 132.102. Weapons Control

(*A*) *Definitions*:

Firearm: "Firearm" means any device, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas or escape of gas; excluding however:

(1) Any pneumatic gun, spring gun or B-B gun which expels a single globular projectile not exceeding .18 inches in diameter.

(2) Any device used exclusively for signalling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission.

(3) Any device used exclusively for the firing of stud cartridges, explosive rivets or similar industrial ammunition.

(4) An antique firearm (other than a machine gun) which, although designed as a weapon, the Department of Law Enforcement of the State of Illinois finds by reason of the date of its manufacture, value, design and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(5) Model rockets designed to propel a model vehicle in a vertical direction.

Handgun: Any firearm which (a) is designed or redesigned or made or remade, and intended to be fired while

(Footnote continued on following page)

[1] *continued*

held in one hand or (b) having a barrel of less than 10 inches in length or (c) a firearm of a size which may be concealed upon the person.

Person: Any individual, corporation, company, association, firm, partnership, club, society or joint stock company.

Handgun Dealer: Any person engaged in the business of (a) selling or renting handguns at wholesale or retail (b) manufacture of handguns (c) repairing handguns or making or firing special barrels or trigger mechanisms to handguns.

Licensed Firearm Collector: Any person licensed as a collector by the Secretary of the Treasury of the United States under and by virtue of Title 18, United States Code, Section 923.

Licensed Gun Club: A club or organization, organized for the purpose of practicing shooting at targets, licensed by the Village of Morton Grove under Section 90.20 of the Code of Ordinances of the Village of Morton Grove.

(*B*) *Possession:*

No person shall possess, in the Village of Morton Grove the following:

(1) Any bludgeon, black-jack, slug shot, sand club, sand bag, metal knuckles or any knife, commonly referred to as a switchblade knife, which has a blade that opens automatically by hand pressure applied to a button, spring, or other device in the handle of the knife, or

(2) Any weapon from which 8 or more shots or bullets may be discharged by a single function of the firing device, any shotgun having one or more barrels less than 18 inches in length, sometimes called a sawed off shotgun or any weapon made from a shotgun, whether by alteration, modification or otherwise, if such weapon, as modified or altered has an overall length of less than 26 inches, or a barrel length of less than 18 inches or any bomb, bomb-shell, grenade, bottle or other container containing an explosive substance of over one-quarter ounce for like purposes, such as, but not limited to black powder bombs and molotov cocktails or artillery projectiles; or

(3) Any handgun, unless the same has been rendered permanently inoperative.

(*C*) *Subsection B(1) shall not apply to or affect any peace officer.*

(Footnote continued on following page)

[1] *continued*

(D) Subsection B(2) shall not apply to or affect the following:

(1) Peace officers;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense;

(3) Members of the Armed Services or Reserve Forces of the United States or the Illinois National Guard, while in the performance of their official duties; and

(4) Transportation of machine guns to those persons authorized under Subparagraphs (1) and (2) of this subsection to possess machine guns, if the machine guns are broken down in a non-functioning state or not immediately accessible.

(E) Subsection B(3) does not apply to or affect the following:

(1) Peace officers or any person summoned by any peace officer to assist in making arrests or preserving the peace while he is actually engaged in assisting such officer and if such handgun was provided by the peace officer;

(2) Wardens, superintendents and keepers of prisons, penitentiaries, jails and other institutions for the detention of persons accused or convicted of an offense;

(3) Members of the Armed Services or Reserve Forces of the United States or the Illinois National Guard or the Reserve Officers Training Corps while in the performance of their official duties.

(4) Special Agents employed by a railroad or a public utility to perform police functions; guards of armored car companies; watchmen and security guards actually and regularly employed in the commercial or industrial operation for the protection of persons employed and private property related to such commercial or industrial operation;

(5) Agents and investigators of the Illinois Legislative Investigating Commission authorized by the commission to carry such weapons;

(6) Licensed gun collectors;

(7) Licensed gun clubs provided the gun club has premises from which it operates and maintains possession and control of handguns used by its members, and has procedures and facilities for keeping such handguns in a

(Footnote continued on following page)

within the Village's borders. The district court held that the Ordinance was constitutional. We affirm.

I

Victor D. Quilici initially challenged Ordinance No. 81-11 in state court. Morton Grove removed the action to federal court where it was consolidated with two similar actions, one brought by George L. Reichert and Robert E. Metler (collectively Reichert) and one brought by Robert Stengl, Martin Gutenkauf, Alice Gutenkauf, Walter J. Dutchak and Geoffrey Lagonia (collectively Stengl). Plaintiffs alleged that Ordinance #81-11 violated article I, section 22 of the Illinois Constitution and the second, ninth and fourteenth amendments of the United States Constitution. They sought an order declaring the Ordinance unconstitutional and permanently enjoining its enforcement. The parties filed cross motions for summary judgment. The district court granted Morton Grove's motion for summary judgment and denied plaintiffs' motions for summary judgment.

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[1] *continued*

safe place, under the control of the club's chief officer, at all times when they are not being used for target shooting or other sporting or recreational purposes at the premises of the gun club; and gun club members while such members are using their handguns at the gun club premises;

(8) A possession of an antique firearm;

(9) Transportation of handguns to those persons authorized under Subparagraphs 1 through 8 of this subsection to possess handguns, if the handguns are broken down in a non-functioning state or not immediately accessible.

(10) Transportation of handguns by persons from a licensed gun club to another licensed gun club or transportation from a licensed gun club to a gun club outside the limits of Morton Grove; provided however that the transportation is for the purpose of engaging in competitive target shooting or for the purpose of permanently keeping said handgun at such new gun club; and provided further that at all times during such transportation said handgun shall have trigger locks securely fastened to the handgun.

In its opinion, *Quilici v. Village of Morton Grove*, 532 F.Supp. 1169 (N.D. Ill. 1981), the district court set forth several reasons for upholding the handgun ban's validity under the state and federal constitutions. First, it held that the Ordinance which banned only certain kinds of arms was a valid exercise of Morton Grove's police power and did not conflict with section 22's conditional right to keep and bear arms. Second, relying on *Presser v. Illinois*, 116 U.S. 252 (1886), the court concluded that the second amendment's guarantee of the right to bear arms has not been incorporated into the fourteenth amendment and, therefore, is inapplicable to Morton Grove. Finally, it stated that the ninth amendment does not include the right to possess handguns for self-defense. Appellants contend that the district court incorrectly construed the relevant constitutional provisions, assigning numerous errors based on case law, historical analysis, common law traditions and public policy concerns.[2]

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[2] Three amici briefs were also filed, by the Illinois State Rifle Association, the Handgun Control, Inc., and the States of Arizona, Connecticut, Hawaii, Idaho, Louisiana, Missouri, Montana, Nevada, North Carolina, Oregon and Wyoming collectively. We have considered the arguments raised in these briefs and find that, for the most part, they raise the same arguments as those raised by the parties.

However, the states' amici curiae brief raises one issue not raised by the parties or addressed by the district court. The states argue that the district court should have abstained because the federal court may not construe a state constitutional provision when the state court has not yet had the opportunity to construe that provision. Amici Curiae br. at 8. The states admit that abstention is not required when the state constitutional provision parallels the federal constitutional provision. However, relying on *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), they assert that the state constitutional provision involved in this case is unique, and thus, the federal court should not have prematurely usurped the state's prerogative to interpret its own constitution.

We disagree. Since abstention is not mandatory, the federal court must determine whether abstention is appropriate in a

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While we recognize that this case raises controversial issues which engender strong emotions, our task is to apply the law as it has been interpreted by the Supreme Court, regardless of whether that Court's interpretation comports with various personal views of what the law should be. We are also aware that we must resolve the controversy without rendering unnecessary constitutional decisions. *Richard Nixon v. A. Ernest Fitzgerald*, 102 S.Ct. 2690 (1982). With these principles in mind we address appellants' contentions.

II

We consider the state constitutional issue first. The Illinois Constitution provides:

> Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

Ill. Const. art. I, § 22. The parties agree that the meaning of this section is controlled by the terms "arms" and "police power" but disagree as to the scope of these terms.

Relying on the statutory construction principles that constitutional guarantees should be broadly construed and that constitutional provisions should prevail over conflicting statutory provisions, appellants allege that section 22's guarantee of the right to keep and bear

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[2] *continued*

particular case. 1A Moore's Federal Practice § 0.203[1] at 2105 (1977). Federal courts have been reluctant to abstain when fundamental rights such as voting, racial equality or rights of expression are involved. *Id.* at 2111-12. We consider the issue of gun control of vital importance to every citizen and, for this reason, do not believe that abstention is any more appropriate in this case than in cases where fundamental rights are involved. Moreover, the purpose of the abstention doctrine is to minimize the conflict between the federal and state systems. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941). There is no conflict here, for Morton Grove voluntarily removed this case to federal court. Accordingly, we find that the abstention doctrine has no relevance.

arms prohibits a complete ban of any one kind of arm. They argue that the constitutional history of section 22 establishes that the term "arms" includes those weapons commonly employed for "recreation or the protection of person and property," 6 Record of Proceedings, Sixth Illinois Constitutional Convention 87 (Proceedings), and contend that handguns have consistently been used for these purposes.

Appellants concede that the phrase "subject to the police power" does not prohibit reasonable regulation of arms. Thus, they admit that laws which require the licensing of guns or which restrict the carrying of concealed weapons or the possession of firearms by minors, convicted felons, and incompetents are valid. However, they maintain that no authority supports interpreting section 22 to permit a ban on the possession of handguns merely because alternative weapons are not also banned. They argue that construing section 22 in this manner would lead to the anomalous situation in which one municipality completely bans handguns while a neighboring municipality completely bans all arms but handguns.

In contrast, Morton Grove alleges that "arms" is a general term which does not include any specific kind of weapon. Relying on section 22's language, which they characterize as clear and explicit, Morton Grove reads section 22 to guarantee the right to keep only some, but not all, arms which are used for "recreation or the protection of person and property." It argues that the Ordinance passes constitutional muster because standard rifles and shotguns are also used for "recreation or the protection of person and property" and Ordinance #81-11 does not ban these weapons.

While Morton Grove does not challenge appellants' assertion that "arms" includes handguns, we believe that a discussion of the kind of arms section 22 protects is an appropriate place to begin our analysis. Because we disagree with Morton Grove's assertion that section 22's language is clear and explicit, we turn to the constitutional debates for guidance on the proper construction

of arms.[3] *Client Follow-Up Co. v. Hynes*, 75 Ill. 2d 208, 216, 390 N.E.2d 847, 850 (1979), citing *Wolfson v. Avery*, 6 Ill.2d 78, 126 N.E.2d 701 (1955).[4]

The debates indicate that the category of arms protected by section 22 is not limited to military weapons; the framers also intended to include those arms that "law-abiding persons commonly employ[ed]" for "recreation or the protection of person and property." 6 Proceedings 87. Handguns are undisputedly the type of arms commonly used for "recreation or the protection of person and property."

Our conclusion that the framers intended to include handguns in the class of protected arms is supported by the fact that in discussing the term the Proceedings refer to *People v. Brown*, 253 Mich. 537, 541-42, 235 N.W. 245, 246-47 (1931) and *State v. Duke*, 42 Tex. 455, 458 (1875). *Brown* defines weapons as those "relied upon . . . for defense or pleasure," including "ordinary guns"

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[3] In construing section 22, the district court also relied heavily on the constitutional debates. Appellants challenge this reliance, arguing that constitutional ambiguities are best resolved by the voters' understanding at the time of the vote on the proposed constitution. Appellants contend that the voters' understanding should be gleaned from: (1) the Official Explanation published prior to the ratification vote; (2) newspaper articles discussing the proposed section 22; and (3) the meaning which the voters were likely to have attributed to the term "police power." Since the district court thoroughly analyzed, and properly rejected, this theory of statutory construction, *Quilici v. Village of Morton Grove*, 532 F. Supp. at 1174-75, we need not repeat that analysis here.

[4] Reichert cites *Client Follow-Up Co. v. Hynes*, 75 Ill.2d 208, 390 N.E.2d 847 (1979) to support his assertion that the district court erroneously relied on the constitutional convention debates to construe section 22. He contends that *Client Follow-Up* holds that constitutional convention debates are useful only when those debates demonstrate a consensus among the delegates. Reichert correctly states the *Client Follow-Up* holding, but ignores the fact that the Proceedings indicate a majority consensus among the delegates as to the meaning of section 22. *See, e.g.*, 3 Proceedings 1711, 1717-19, 1818.

and "revolvers." 253 Mich. at 542, 235 N.W. at 247. *Duke* states that "[t]he arms which every person is secured the right to keep and bear (in defense of himself or the State, subject to legislative regulation), must be such arms as are commonly kept, . . . and are appropriate for . . . self-defense, as well as such as are proper for the defense of the State." 42 Tex. at 458. The delegates' statements and reliance on *Brown* and *Duke* convinces us that the term arms in section 22 includes handguns.

Having determined that section 22 includes handguns within the class of arms protected, we must now determine the extent to which a municipality may exercise its police power to restrict, or even prohibit, the right to keep and bear these arms. The district court concluded that section 22 recognizes only a narrow individual right which is subject to substantial legislative control. It noted that "[t]o the extent that one looks to the convention debate for assistance in reconciling the conflict between the right to arms and the exercise of the police power, the debate clearly supports a narrow construction of the individual right." *Quilici v. Village of Morton Grove*, 532 F. Supp. at 1174. It further noted that while the Proceedings cite some cases holding that the state's police power should be read restrictively, those cases were decided under "distinctly different constitutional provisions" and, thus, have little application to this case. *Id.* at 1176.

We agree with the district court that the right to keep and bear arms in Illinois is so limited by the police power that a ban on handguns does not violate that right. In reaching this conclusion we find two factors significant. First, section 22's plain language grants only the right to keep and bear arms, not handguns. Second, although the framers intended handguns to be one of the arms conditionally protected under section 22, they also envisioned that local governments might exercise their police power to restrict, or prohibit, the right to keep and bear handguns. For example, Delegate Foster, speaking for the majority, explained:

> It could be argued that, in theory, the legislature now [prior to the adoption of the 1970 Illinois Constitution] has the right to ban all firearms in the state as far as individual citizens owning them is concerned. That is the power which we wanted to restrict—an absolute ban on all firearms.

3 Proceedings 1688. Delegate Foster then noted that section 22 "would prevent a complete ban on all guns, but there could be a ban on certain categories." *Id.* at 1693.[5] It is difficult to imagine clearer evidence that section 22 was intended to permit a municipality to ban handguns if it so desired.

Appellants argue that construing section 22 to protect only some unspecified categories of arms, thereby allowing municipalities to exercise their police power to enact dissimilar gun control laws, leads to "untenable" and "absurd" results. Quilici br. at 14. This argument ignores the fact that the Illinois Constitution authorizes local governments to function as home rule units to "exercise any power and perform any function pertaining to its government and affairs". Illinois Const. art. VIII, § 6(a). Home rule government[6] is based on the the-

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[5] The Proceedings are replete with other statements supporting our holding. See, for example, Delegate Foster's statement that "we feel that under . . . [section 22] . . . the state would have the right to prohibit some classes of firearms, such as war weapons, handguns, or some other category." 3 Proceedings 1818. See also his statement immediately prior to the vote on the proposed section 22 that: "[i]t is the position of the majority that under the police power of the state, the legislature would have the authority, for example, to forbid all handguns . . . [and] it is still the position of the majority that short of an absolute and complete ban on the possession of all firearms, this provision would leave the legislature free to regulate the use of firearms in Illinois." 3 Proceedings 1718.

[6] Ill. Const. art. VII, § 6(a) provides:

> A County which has a chief executive officer elected by the county and any municipality which has a population of more than 25,000 are home rule units. Other municipal-

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ory that local governments are in the best position to assess the needs and desires of the community and, thus, can most wisely enact legislation addressing local concerns. *Carlson v. Briceland*, 61 Ill. App. 3d 247, 377 N.E.2d 1138 (1978). Illinois home rule units have expansive powers to govern as they deem proper, *see generally* Hall & Wallack, *Intergovernmental Cooperation and the Transfer of Powers*, 1981 U. Ill. L. Rev. 775, 777-79; Vitullo & Peters, *Intergovernmental Cooperation and the Municipal Insurance Crisis*, 30 DePaul L. Rev. 325, 326-29 (1981); including the authority to impose greater restrictions on particular rights than those imposed by the state. *See City of Evanston v. Create, Inc.*, 85 Ill. 2d 101, 421 N.E.2d 196 (1981). The only limits on their autonomy are those imposed by the Illinois Constitution, *City of Carbondale ex rel. Ham v. Eckert*, 76 Ill. App. 3d 881, 395 N.E.2d 607 (1979), or by the Illinois General Assembly exercising its authority to pre-empt home rule in specific instances. Because we have concluded that the Illinois Constitution permits a ban on certain categories of arms, home rule units such as Morton Grove may properly enact different, even inconsistent, arms restrictions. This is precisely the kind of local control envisioned by the new Illinois Constitution.

Appellants concede that municipalities may, under the Illinois Constitution, exercise their police power to enact regulations which prohibit "possession of items legislatively found to be dangerous . . .", Quilici br. at 9. They draw a distinction, however, between the exercise

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[6] *continued*

> ities may elect by referendum to become home rule units. Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax and to incur debt.

The parties do not dispute the fact that Morton Grove is a home rule unit and the court notes that, in 1980, Morton Grove passed a referendum maintaining its home rule status pursuant to Ill. Const. Art. VII, § 6(a).

of the police power in general and the exercise of police power with respect to a constitutionally protected right. Indeed, they vehemently insist that a municipality may not exercise its police power to completely prohibit a constitutional guarantee.

We agree that the state may not exercise its police power to violate a positive constitutional mandate, *People v. Warren*, 11 Ill. 2d 420, 143 N.E.2d 28 (1957), but we reiterate that section 22 simply prohibits an absolute ban on all firearms. Since Ordinance No. 81-11 does not prohibit all firearms, it does not prohibit a constitutionally protected right. There is no right under the Illinois Constitution to possess a handgun, nor does the state have an overriding state interest in gun control which requires it to retain exclusive control in order to prevent home rule units from adopting conflicting enactments. *See City of Evanston v. Create, Inc.*, 85 Ill.2d 101, 421 N.E.2d 196 (1981). Accordingly, Morton Grove may exercise its police power to prohibit handguns even though this prohibition interferes with an individual's liberty or property. *People v. Warren*, 11 Ill.2d 420, 143 N.E.2d 28 (1957).

The Illinois Constitution establishes a presumption in favor of municipal home rule. *Carlson v. Briceland*, 61 Ill. App. 3d 247, 377 N.E.2d 1138 (1978). Once a local government identifies a problem and enacts legislation to mitigate or eliminate it, that enactment is presumed valid and may be overturned only if it is unreasonable, clearly arbitrary, and has no foundation in the police power. *Illinois Gamefowl Breeders Ass'n v. Block*, 75 Ill.2d 443, 389 N.E.2d 529 (1979); *People v. Copeland*, 92 Ill. App. 3d 475, 415 N.E.2d 1173 (1st Dist. 1980). Thus, it is not the province of this court to pass judgment on the merits of Ordinance No. 81-11; our task is simply to determine whether Ordinance No. 81-11's restrictions are rationally related to its stated goals. *People ex rel. Difanis v. Barr*, 83 Ill.2d 191, 414 N.E.2d 731 (1980). As the district court noted, there is at least some empirical evidence that gun control legislation may reduce the number of deaths and accidents

caused by handguns. *Quilici v. Village of Morton Grove*, 532 F. Supp. at 1179. This evidence is sufficient to sustain the conclusion that Ordinance No. 81-11 is neither wholly arbitrary nor completely unsupported by any set of facts. *People v. Copeland*, 92 Ill. App. 3d 475, 415 N.E.2d 1173 (1st Dist. 1980). Accordingly, we decline to consider plaintiffs' arguments that Ordinance No. 81-11 will not make Morton Grove a safer, more peaceful place.

We agree with the district court that Ordinance No. 81-11: (1) is properly directed at protecting the safety and health of Morton Grove citizens; (2) is a valid exercise of Morton Grove's police power; and (3) does not violate any of appellants' rights guaranteed by the Illinois Constitution.[7]

III

We next consider whether Ordinance No. 81-11 violates the second amendment to the United States Constitution. While appellants all contend that Ordinance No. 81-11 is invalid under the second amendment, they offer slightly different arguments to substantiate this contention. All argue, however, that the second amendment applies to state and local governments and that the second amendment guarantee of the right to keep and bear arms exists, not only to assist in the common defense, but also to protect the individual. While reluctantly conceding that *Presser v. Illinois*, 116 U.S. 252 (1886), held that the second amendment applied only to action by the federal government, they nevertheless assert that *Presser* also held that the right to keep and bear arms is an attribute of national citizenship which is not subject to state restriction. Reichert br. at 36. Finally, apparently responding to the district court's comments that "[p]laintiffs . . . have not suggested that the Morton Grove Ordi-

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[7] We note that *Kalodimos v. Village of Morton Grove*, 81 Ch. 6424 slip op. (Cook County, Ill. Jan. 29, 1982) in which Reichert was one of several plaintiffs, is consistent with our analysis here.

nance in any way interferes with the ability of the United States to maintain public security . . ." *Quilici v. Village of Morton Grove*, 532 F. Supp. at 1169. Quilici and Reichert argue in this court that the Morton Grove Ordinance interferes with the federal government's ability to maintain public security by preventing individuals from defending themselves and the community from "external or internal armed threats." Quilici br. at 12; Reichert br. at 37-38. These are the same arguments made in the district court. Accordingly, we comment only briefly on the points already fully analyzed in that court's decision.

As we have noted, the parties agree that *Presser* is controlling, but disagree as to what *Presser* held. It is difficult to understand how appellants can assert that *Presser* supports the theory that the second amendment right to keep and bear arms is a fundamental right which the state cannot regulate when the *Presser* decision plainly states that "[t]he Second Amendment declares that it shall not be infringed, but this . . . means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government . . . ." *Presser v. Illinois*, 116 U.S. 252, 265 (1886). As the district court explained in detail, appellants' claim that *Presser* supports the proposition that the second amendment guarantee of the right to keep and bear arms is not subject to state restriction is based on dicta quoted out of context. *Quilici v. Village of Morton Grove*, 532 F.Supp. at 1181-82. This argument borders on the frivolous and does not warrant any further consideration.

Apparently recognizing the inherent weakness of their reliance on *Presser*, appellants urge three additional arguments to buttress their claim that the second amendment applies to the states. They contend that: (1) *Presser* is no longer good law because later Supreme Court cases incorporating other amendments into the fourteenth amendment have effectively overruled *Presser*, Reichert br. at 52; (2) *Presser* is illogical, Quilici br. at 12; and (3) the entire Bill of Rights has been implicit-

ly incorporated into the fourteenth amendment to apply to the states, Reichert br. at 48-52.

None of these arguments has merit. First, appellants offer no authority, other than their own opinions, to support their arguments that *Presser* is no longer good law or would have been decided differently today. Indeed, the fact that the Supreme Court continues to cite *Presser*, *Malloy v. Hogan*, 378 U.S. 1, 4 n.8 (1964), leads to the opposite conclusion. Second, regardless of whether appellants agree with the *Presser* analysis, it is the law of the land and we are bound by it. Their assertion that *Presser* is illogical is a policy matter for the Supreme Court to address. Finally, their theory of implicit incorporation is wholly unsupported. The Supreme Court has specifically rejected the proposition that the entire Bill of Rights applies to the states through the fourteenth amendment. *Adamson v. California*, 332 U.S. 46 (1947), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Twining v. New Jersey*, 211 U.S. 78 (1908).

Since we hold that the second amendment does not apply to the states, we need not consider the scope of its guarantee of the right to bear arms. For the sake of completeness, however, and because appellants devote a large portion of their briefs to this issue, we briefly comment on what we believe to be the scope of the second amendment.

The second amendment provides that "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Construing this language according to its plain meaning, it seems clear that the right to bear arms is inextricably connected to the preservation of a militia. This is precisely the manner in which the Supreme Court interpreted the second amendment in *United States v. Miller*, 307 U.S. 174 (1939), the only Supreme Court case specifically addressing that amendment's scope. There the Court held that the right to keep and bear arms extends only to those arms which are necessary to maintain a well regulated militia.

In an attempt to avoid the *Miller* holding that the right to keep and bear arms exists only as it relates to protecting the public security, appellants argue that "[t]he fact that the right to keep and bear arms is joined with language expressing one of its purposes in no way permits a construction which limits or confines the exercise of that right." Reichert br. at 35. They offer no explanation for how they have arrived at this conclusion. Alternatively, they argue that handguns are military weapons.[8] Stengl's br. at 11-13. Our reading of *Miller* convinces us that it does not support either of these theories. As the Village correctly notes, appellants are essentially arguing that *Miller* was wrongly decided and should be overruled. Such arguments have no place before this court. Under the controlling authority of *Miller* we conclude that the right to keep and bear handguns is not guaranteed by the second amendment.[9]

Because the second amendment is not applicable to Morton Grove and because possession of handguns by individuals is not part of the right to keep and bear arms, Ordinance No. 81-11 does not violate the second amendment.

IV

Finally, we consider whether Ordinance No. 81-11 violates the ninth amendment. Appellants argue that,

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[8] Appellants devote a portion of their briefs to historical analysis of the development of English common law and the debate surrounding the adoption of the second and fourteenth amendments. This analysis has no relevance on the resolution of the controversy before us. Accordingly, we decline to comment on it, other than to note that we do not consider individually owned handguns to be military weapons.

[9] A similar conclusion has been reached by numerous other courts. *United States v. Oakes*, 564 F.2d 394 (6th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976); *Cody v. United States*, 460 F.2d 34, (8th Cir.), *cert. denied*, 409 U.S. 1010 (1972); *Stevens v. United States*, 440 F.2d 144 (6th Cir. 1971).

although the right to use commonly-owned arms for self-defense is not explicitly listed in the Bill of Rights, it is a fundamental right protected by the ninth amendment. Citing no authority which directly supports their contention, they rely on the debates in the First Congress and the writings of legal philosophers to establish that the right of an individual to own and possess firearms for self-defense is an absolute and inalienable right which cannot be impinged.

Since appellants do not cite, and our research has not revealed, any Supreme Court case holding that any specific right is protected by the ninth amendment, appellants' argument has no legal significance. Appellants may believe the ninth amendment should be read to recognize an unwritten, fundamental, individual right to own or possess firearms; the fact remains that the Supreme Court has never embraced this theory.[10]

V

Reasonable people may differ about the wisdom of Ordinance No. 81-11. History may prove that the Ordinance cannot effectively promote peace and security for Morton Grove's citizens. Such issues, however, are not before the court. We simply hold the Ordinance No. 81-11 is a proper exercise of Morton Grove's police power and does not violate art. I, § 22 of the Illinois Constitution or the second, ninth, or fourteenth amendments of the United States Constitution. Accordingly, the decision of the district court is

AFFIRMED.

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[10] Appellants also argued, in the district court, that Ordinance No. 81-11 violated the fifth amendment and is unconstitutionally vague. These arguments were not raised in this court.

COFFEY, *Circuit Judge*, dissenting.

The constitutions of the United States and the respective states define and delineate the powers of our various governmental units. As a fundamental principle, if a governing body (federal, state or local) should at any time overstep its limits the judiciary must act as a constitutional check. This was the intent of the framers of the Constitution as evidenced by their dividing the powers and responsibilities of the government into three separate and distinct branches. Specifically, if a legislative body enacts a law exceeding the constitutional limits of its authority, it is the responsibility and the duty of an independent judiciary to declare it void.

With this principle in mind and conscious of the magnitude of the political and social implications of this case, I am compelled to dissent from my brethren today. It is my opinion that the Village of Morton Grove has improperly legislated beyond the legitimate parameters of its authority.

I base my conclusion upon three grounds. First, Morton Grove Ordinance No. 81-11 is an impermissible attempt by the governing body of the Village to address an issue which the people of the State of Illinois through their elected representatives have deemed to be a matter properly resolved by state action. The state's long-standing and comprehensive regulation and prohibition of handgun possession preempts local legislation on the subject. Second, and closely related to the first, I believe that the Ordinance is invalid under the home rule provisions of the Illinois Constitution in that the regulation of handgun possession is a matter of statewide rather than local concern and the Morton Grove Ordinance contradicts state law regarding the possession of handguns. Third, I believe that Morton Grove Ordinance No. 81-11, as a matter of constitutional law, impermissibly interferes with individual privacy rights. I join others who throughout history have recognized that an individual in this country has a protected right, within the confines of the criminal law, to guard his or her home or place of business from unlawful intrusions. In my view, today's

majority decision marks a new nadir for the fundamental principle that "a man's home is his castle." It has been said that the greatest threat to our liberty is from well-meaning, and almost imperceptible governmental incroachments upon our personal freedom. Today's decision sanctions an intrusion on our basic rights as citizens which would no doubt be alarming and odious to our founding fathers. For the above-cited reasons, which I shall discuss in greater detail herein, I respectfully dissent from the opinion of this court.

I.

The Village of Morton Grove's Ordinance No. 81-11 is invalid as the law is an improper attempt by the locality to address a subject which has been deemed by the Illinois Legislature to be exclusively a matter of state concern and control. The state legislature, through extensive and long-standing regulation, has preempted the subject of handgun possession.

Although most frequently addressed in the context of federal versus state enactments, the doctrine of preemption has been recognized as also being applicable to situations involving duplicate areas of state and local legislation. The Illinois Supreme Court has recognized that the existence of long-standing and extensive state regulation of a certain subject matter evidences an implied intent to preempt that field to the exclusion of local municipalities. In *Ampersand, Inc. v. Finley*, 61 Ill.2d 537, 338 N.E.2d 15 (1975), the Illinois Supreme Court acknowledged and approved the following examples contained in the Record of the Proceedings of the Sixth Illinois Constitutional Convention:

> "'Home Rule County adopts an ordinance providing for limits upon rates of interest that may be charged on mortgage and other loans to residents of the county. This ordinance is not valid. The interest-control ordinance is not included in the home-rule powers granted by [section 6(a)] *because of the extensive federal and state regulation of credit institutions.*'
>
> * * *

> 'Home Rule City adopts an ordinance limiting the rates that may be charged by the telephone company for local calls. *Long-standing state regulation of utility rates precludes this subject from being considered a matter pertaining to home-rule government and affairs.*'"

Id. 338 N.E.2d at 17 (emphasis added).

The Illinois Appellate Court has also recognized that "where the legislature has adopted a scheme for regulation of a given subject, local legislative control over such phases of the subject as are covered by state regulation ceases." *Hutchcraft Van Serv. v. City of Urbana, Etc.*, 104 Ill.App.3d 817, 433 N.E.2d 329, 333 (1982).[1] The *Hutchcraft* court held that "the legislature has preempted the subject of freedom from unlawful discrimination." *Id.* at 334. In so deciding, the court emphasized that it "would be hard-put to envision a more comprehensive statutory scheme than that contained in the Illinois Human Rights Act." *Id.* Similarly, the subject of the prohibition of handgun possession has been impliedly preempted by the Illinois Legislature because one would be "hard-put to envision a more comprehensive statutory scheme than that" set forth in the state statutes on the subject of handgun possession.

The Illinois Legislature, when enacting and amending chapter 38, set forth an extensive scheme, applying to all persons in Illinois, regulating who may possess firearms, when and where they may possess firearms and the types of firearms they may possess. Possession of a handgun or other firearm by a minor, felon, drug addict or mentally ill or retarded person is forbidden by Illinois statute. Ill. Rev. Stat. ch. 38, § 24-3.1.[2] Chapter 38, § 24-1(a)(10) of the

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[1] On October 5, 1982, the Illinois Supreme Court denied a petition for leave to appeal the *Hutchcraft* decision, Illinois Supreme Court Docket No. 56635.

[2] Ill. Rev. Stat. ch. 38, § 24-3.1 provides in pertinent part:

"24-3.1. Unlawful possession of firearms and firearm ammunition.

(Footnote continued on following page)

Illinois statutes already prohibits possession of a handgun by a person on a public street, alley or public lands[3] and the carrying of a concealed handgun under certain circumstances is proscribed by Ill. Rev. Stat. ch. 38, § 24-

[2] *continued*

(a) A person commits the offense of unlawful possession of firearms or firearm ammunition when:

(1) He is under 18 years of age and has in his possession any firearm of a size which may be concealed upon the person.

(2) He is under 21 years of age, has been convicted of a misdemeanor other than a traffic offense or adjudged delinquent and has any firearms or firearm ammunition in his possession; or

(3) He has been convicted of a felony under the laws of this or any other jurisdiction within 5 years from release from the penitentiary or within 5 years of conviction if penitentiary sentence has not been imposed, and has any firearms or firearm ammunition in his possession; or

(4) He is a narcotic addict and has any firearms or firearm ammunition in his possession; or

(5) He has been a patient in a mental hospital within the past 5 years and has any firearms or firearm ammunition in his possession; or

(6) He is mentally retarded and has any firearms or firearm ammunition in his possession; or

* * *"

[3] Ill. Rev. Stat. ch. 38, § 24-1(a)(10) recites:

"Unlawful Use of Weapons. (a) A person commits the offense of unlawful use of weapons when he knowingly:

* * *

(10) Carries or possesses on or about his person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town, except when an invitee thereon or therein, for the purpose of the display of such weapon or the lawful commerce in weapons, or except when on his land or in his own abode or fixed place of business, any pistol, revolver, stun gun or taser or other firearm."

1(a)(4).[4] Additionally, it is a violation of state law to possess a firearm in an establishment licensed to sell liquor, wine or beer.[5] Moreover, the legislature has banned the possession of specific types of firearms (i.e., machine guns and sawed-off shotguns) in all circumstances but has refrained from enacting such a categorical prohibition of handgun possession.[6]

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[4] Ill. Rev. Stat. ch. 38, § 24-1(a)(4) states:

"§ 24-1. Unlawful Use of Weapons. (a) A person commits the offense of unlawful use of weapons when he knowingly:

* * *

(4) Carries or possesses in any vehiche or concealed on or about his person except when on his land or in his own abode or fixed place of business any pistol, revolver, stun gun or taser or other firearm; or

* * *"

[5] Ill. Rev. Stat. ch. 38, § 24-1(a)(8) states:

"§ 24.1. Unlawful Use of Weapons. (a) A person commits the offense of unlawful use of weapons when he knowingly:

* * *

(8) Carries or possesses any firearm, stun gun or taser or other deadly weapon in any place which is licensed to sell intoxicating beverages, or at any public gathering held pursuant to a license issued by any governmental body or any public gathering at which an admission is charged, excluding a place where a showing, demonstration or lecture involving the exhibition of unloaded firearms is conducted; or

* * *"

[6] Ill. Rev. Stat. ch. 38, § 24-1(a)(7) provides:

"§ 24-1. Unlawful Use of Weapons. (a) A person commits the offense of unlawful use of weapons when he knowingly:

* * *

(Footnote continued on following page)

As recognized by the majority, consideration was given to the issue of firearm possession at Illinois' Sixth Constitutional Convention. It is clear from a review of the transcript of the debates that it was the *state's* police power vis-a-vis firearm possession which was the subject of debate. It was noted that Article I, section 22 of the 1970 Illinois Constitution allows the state legislature considerable discretion in the regulation and prohibition of firearm use and possession. It is pursuant to this authority that the State of Illinois enacted and enforces the extensive provisions of chapter 38. Where the legislature after due deliberation has seen fit to outlaw the possession of handguns it has done so. The statutes discussed above constitute the Illinois Legislature's comprehensive promulgation of mandates concerning the issue of gun possession which: (1) prohibits minors, felons, drug addicts and mentally ill and retarded persons from possessing any firearms; (2) proscribes firearm possession on public streets and alleys and in public places; (3) forbids the carrying of a concealed weapon under certain circumstances; (4) prohibits possession of a firearm in a place licensed to sell alcoholic beverages; (5) prohibits without exclusion the possession of a machine gun or a sawed-off shotgun; and (6) expressly authorizes possession of a handgun within the confines of one's home or fixed place of business.

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[6] *continued*

(7) Sells, manufactures, purchases, possesses or carries any weapon from which 8 or more shots or bullets may be discharged by a single function of the firing device, any shotgun having one or more barrels less than 18 inches in length, sometimes called a sawed-off shotgun, or any weapon made from a shotgun whether by alteration, modification or otherwise, if such weapon, as modified or altered, has an overall length of less than 26 inches, or a barrel length of less than 18 inches or any bomb, bombshell, grenade, bottle or other container containing an explosive substance of over one-quarter ounce for like purposes, such as, but not limited to, black powder bombs and Molotov cocktails or artillery projectiles; or

* * *"

A locality such as Morton Grove may address a matter of public concern, such as handgun prohibition, only if the Illinois Legislature has not revealed, either expressly or by implication, an intention to occupy the field to the exclusion of all local legislation. The subject of the prohibition of firearm possession has been so extensively and comprehensively addressed in the Illinois Statutes as to impliedly indicate a positive legislative intent to exclusively occupy the field. Therefore, Illinois municipalities are precluded from enacting provisions prohibiting handgun possession.

Further support for the proposition that the Illinois Legislature intended to peremptorily address the issue of the prohibition of handguns and firearms is found when comparing Ill. Rev. Stat. ch. 38, § 24 (addressed above) with Ill. Rev. Stat. ch. 38, § 83. Section 24, known as the "Deadly Weapons Act," sets forth the qualifications for the lawful ownership and possession of firearms while section 83 directs owners of firearms to obtain "Firearm Owner's Identification Cards" issued by the Illinois Department of Law Enforcement. Section 83 contains a proviso authorizing municipalities to impose greater *restrictions* or *limitations* on firearm registration and possession than those imposed by the legislature under section 83.[7]

Pursuant to section 83, a municipality can enact an ordinance reasonably restricting or confining the use and possession of firearms. A municipality can also require registration of firearm ownership. What the legislature has authorized is limited regulation of firearm possession by local units of government, but not prohibition. Section

[7] Ill. Rev. Stat. ch. 38, § 83-13.1 recites:

"Municipal Ordinance Imposing Greater Restrictions or Limitations

The provisions of any ordinance enacted by any municipality which requires registration or imposes greater restrictions or limitations on the acquisition, possession and transfer of firearms than are imposed by this Act, are not invalidated or affected by this Act."

83 does not allow a municipality such as Morton Grove to categorically prohibit handgun possession. To limit or restrict involves a circumscription which falls far short of an absolute prohibition.

> "The words 'prohibit' and 'restrict' are not synonymous. They are not alike in their meaning in their ordinary use. . . . 'To restrict is to restrain within bounds; to limit; to confine and does not mean to destroy or prohibit.'"

Forest Land Co. v. Black, 216 S.C. 255, 57 S.E.2d 420, 424 (1950).

If the intention of the Illinois Legislature had been to authorize local prohibition of handgun possession, such intention would have been clearly expressed as was the authorization of local regulation through restriction and limitation. As "[r]egulation is inconsistent with prohibition or exclusion," the proviso to section 83 does not minimize the implied intention of the legislature to exclusively address the issue of handgun possession under section 24. *See Chicago Motor Coach Co. v. City of Chicago*, 337 Ill. 200, 169 N.E. 22, 25 (1929).

The Illinois Legislature, by enacting and amending the extensive provisions of chapter 38, has prohibited certain individuals from possessing firearms, forbidden possession of specific types of firearms and proscribed the possession of firearms in certain places. Despite the Illinois Legislature's refusal to prohibit handgun possession, Morton Grove has seen fit to disregard the legislative intent and has enacted a categorical ban on the possession of handguns, with limited exceptions. In light of long-standing and extensive state control of firearm ownership and possession, Morton Grove Ordinance No. 81-11 impermissibly addresses a subject matter designated by the Illinois Legislature to be the exclusive province of the state legislature.

II.

The powers of Illinois home rule units are not without limitation. The Illinois Constitution provides that a home

rule unit, such as Morton Grove, may "exercise any power and perform any function pertaining to its government and affairs. . . ." Ill. Const. Art. VII, § 6(a). However, any exercise of home rule power by a municipality must be "concurrent" with state legislation in the area. Ill. Const. Art. VII, § 6(i). Morton Grove's Ordinance No. 81-11 is invalid under the Illinois Constitution because the matter of handgun prohibition is not one solely pertaining to local government or local affairs and furthermore, the ordinance is repugnant to and is not concurrent with related state legislation.

Although the powers of home rule units are to be liberally construed, Illinois courts have invalidated ordinances which affected persons and governmental bodies outside the home rule unit. *See Landry v. Smith*, 66 Ill.App.3d 606, 384 N.E.2d 430, 433 (1978). Such a limitation on home rule authority was recognized by the Illinois Supreme Court in the *Ampersand* decision noted above.

> "[T]he question is not whether the 'pertaining to . . .' language should limit the home rule grant, but rather how extensive the limitation should be.
>
> The local government committee, explaining the intended extent of this limitation, stated in its report to the constitutional convention 'it is clear, however, *that the powers of home rule units relate to their own problems, not to those of the state or the nation.*'"

Ampersand, 338 N.E.2d at 17 (emphasis added).

In its *City of Des Plaines v. Chicago & N.W. Ry. Co.*, 65 Ill.2d 1, 357 N.E.2d 433 (1976) decision, the Illinois Supreme Court struck down a municipal noise pollution ordinance holding that it was legislation in an area which did not pertain to the government and affairs of the home rule unit. The *City of Des Plaines* court noted that although "noise pollution may initially appear to be a matter of local concern, an analysis of the problem reveals that noise pollution is a matter requiring regional, if not statewide, standards and controls." *Id.* 357 N.E.2d at 433. Of particular import to the *City of Des*

Plaines court was "the question of noise emission from trains in transit which may pass through numerous municipalities en route to their destination." *Id.* at 435.

Practical considerations regarding the Morton Grove Ordinance show why handgun possession is properly a matter of statewide concern. Like the ordinance invalidated in *City of Des Plaines*, the Morton Grove Ordinance applies not only to residents of the Village, but also is applicable to non-residents traveling through the Village.[8] The Ordinance is obviously designed to prohibit, with limited exceptions, possession of all handguns in Morton Grove whether by residents, non-residents, travelers, etc.

Under the Morton Grove Ordinance, a handgun owner must either take a circuitous route around the Village of Morton Grove or make arrangements to surrender his handgun to the police upon entering the Village and reacquire possession when he leaves.[9] Not only does this infringe upon the citizen's right to travel and, arguably, interfere with interstate commerce but it lends credence to the distinct possibility that gun control in Illinois will be no more than a crazy quilt of conflicting and unenforceable home rule ordinances. In this respect, it is important to remember that "a concomitant effect of this unenforceability is an erosive disrespect for the law which should not be tolerated."[10] Experience has taught

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[8] Ordinance No. 81-11 § 2(B) recites:

"No person shall possess, in the Village of Morton Grove the following:

* * *

(3) Any handgun, unless the same has been rendered permanently inoperative."

[9] Illinois law permits a handgun owner to transport a handgun by car if the handgun is not immediately accessible to the driver or any other occupant of the vehicle. *See* Ill. Rev. Stat. ch. 38, §§ 24-1(a)(4) and 24(2)(b)(4).

[10] *Peoples v. Abrahams*, 40 N.Y.2d 277, 286, 353 N.E.2d 574 (1976).

mankind that the retention of unenforceable laws which are regularly violated breeds contempt for the law in general. Citizens must not be permitted to pick and choose which laws they wish to obey.

The majority opinion fails to recognize that the subject of handgun possession poses problems that transcend municipal boundaries and is thus not a local affair within the meaning of the Illinois Constitution. The majority flatly and cavalierly states that Illinois has "no overriding state interest in gun control which requires it to retain exclusive control in order to prevent home rule units from adopting conflicting enactments." To support this proposition, the majority relies without discussion on *City of Evanston v. Create, Inc.*, 85 Ill.2d 101, 421 N.E.2d 196 (1981).

The *Create* decision, however, is inapposite to the instant case. In *Create*, the Illinois Supreme Court held that an Evanston landlord-tenant ordinance was a valid exercise of Evanston's home rule powers granted by the Illinois Constitution. Landlord-tenant ordinances are, by their very nature, matters of local concern since, like zoning ordinances, they apply exclusively to local residents and landowners. Such ordinances are enacted to be specifically suited to the unique needs of a locality's residents. The local governing body involved is keenly and uniquely aware of the needs of the community it serves. The landlord-tenant ordinance in *Create* had no impact on temporary or transitory visitors to Evanston. On the other hand, the Morton Grove handgun ordinance has a far broader scope in that it effects not only Morton Grove residents but also those citizens who merely pass through the Village.

That the prohibition of handgun possession is properly a matter of state concern can be further illustrated as follows: consider the political and administrative difficulties which would arise if Home-Rule Unit A were to pass an ordinance banning the possession of all handguns and Home-Rule Unit B were to pass an ordinance making handgun possession mandatory. What is outlawed in one municipality becomes mandatory in another. The Il-

linois Legislature never intended to permit the possibility of a hodgepodge of conflicting home rule enactments when it adopted Ill. Rev. Stat. ch. 38 to address the statewide issue of the prohibition of handgun ownership.

An analogy between the subject of gun control and the field of children's health care further highlights the propriety of statewide uniformity and enforcement. Due to difficulties in enforcement and the need for statewise uniformity, many states have passed legislation requiring the immunization of school age children against contagious diseases. *See, e.g.*, Ill. Rev. Stat. ch. 111½ §§ 22.11 and 22.12. If local authorities were allowed to pass conflicting ordinances regarding the vaccination of school age children, the enforcement of these ordinances in multi-municipal school districts would be extremely difficult, if not impossible.

The Illinois Legislature has not enacted a categorical prohibition of handgun possession, even though it was the view of the framers of the Illinois Constitution that firearm possession was a matter of statewide concern and that the state legislature had the power to ban handgun possession, if it so desired. In the debates at the Sixth Illinois Constitutional Convention which adopted the present Illinois Constitution, Delegate Foster, speaking for the majority explained:

> "We feel that . . . the state would have the right to prohibit some classes of firearms, such as war weapons, handguns, or some other category.
>
> * * *
>
> [I]t is the position of the majority that under the police power of the state, the legislature would have the authority, for example, to forbid all handguns . . . [and] it is still the position of the majority that short of an absolute and complete ban on the possession of all firearms, this provision would leave the legislature free to regulate the use of firearms in Illinois."

3 Proceedings of Sixth Illinois Constitutional Convention at 1688, 1818 and 1718.

Delegate Foster's comments demonstrate that it was recognized by the Convention that firearm possession is a matter of state concern. Despite the clear meaning of Foster's words, the majority in the instant case concludes, based on the Delegate's remarks, that the framers of the Illinois Constitution "envisioned that *local governments* might exercise their police power to restrict, or prohibit, the right to keep and bear arms." (emphasis added). The fallacy of the majority's logic is obvious; Delegate Foster said that "the *state* would have the right to prohibit . . . handguns" and "that under the police power of the *state, the legislature* would have the authority, for example, to forbid all handguns. . . ." (emphasis added). In fact, Foster's remarks directly contradict, rather than support, the majority's conclusion that a local municipality such as Morton Grove may prohibit handgun possession; clearly, Foster's view was that handgun possession was a matter of statewide concern best addressed by state legislation.

The Morton Grove Ordinance prohibiting handgun possession is invalid because it does not act concurrently with the Illinois Legislature's extensive regulation of firearm registration and possession. Black's Law Dictionary defines "concurrent" as "united in agreement." BLACK'S LAW DICTIONARY 263 (5th Ed. 1979). Morton Grove's prohibition of handgun possession is not "united in agreement" with the state statutory scheme but is fundamentally at odds with the extensive state regulation of handgun possession. The state legislation is regulatory while Morton Grove's enactment is prohibitory.

The state legislature and the Morton Grove Ordinance approach the subject of gun control from opposite directions. The legislature started from the point that all persons may possess handguns and then proceeded to regulate and restrict specific types of guns, rather than banning handguns and then authorizing certain persons or classes to possess them. This reveals an implied intent to extend to all citizens a privilege to possess handguns except where, by operation of *state law*, that privilege is circumscribed in the interests of the common good. Mor-

ton Grove, in contrast, takes the opposite approach by prohibiting all handguns and then grants permission to possess handguns to limited classes of persons. Thus, the Morton Grove Ordinance is invalid as it is fundamentally at odds with the legislature's will to allow Illinois citizens to possess handguns, except in very limited circumstances, because "the test of concurrent authority . . . is the absence of conflict with the legislative will." *Maryland v. D.C. Rifle & Pistol Ass'n., Inc. v. Washington*, 442 F.2d 123, 130 (D.C. Cir. 1971).

The second reason Morton Grove's Ordinance does not operate concurrently with state law is even more significant. The ordinance is invalid to the extent that it prohibits what is expressly permitted by state statute. "To be sure, a municipal regulation cannot permit an act which the statute forbids, or forbid an act which the statute permits." *Id.*

A number of sections of chapter 38 of the Illinois Statutes contain exceptions to the general provisions which ban the possession of handguns under certain circumstances. Of particular significance are those statutory sections which expressly allow for the possession of handguns by individuals when in their homes, in their fixed places of business or upon their land.[11] The Illinois Legislature has expressly authorized the citizens of Illinois to carry handguns while present in certain locations. Such authorization is directly nullified by Morton Grove Ordinance No. 81-11.

A municipal ordinance providing for the registration of firearms was attacked in *Brown v. City of Chicago*, 42 Ill.2d 501, 250 N.E.2d 129 (1969). Although the Illinois Supreme Court noted that the legislature had not preempted the registration aspect of the subject of gun control, the court did note that the ordinance would be struck down if it contradicted the provisions of the statute. The registration ordinance was upheld because there was "no inconsistency or repugnancy" between it

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[11] *See, e.g.*, Ill. Rev. Stat. ch. 38, §§ 24-1(a)(4), (10).

and statutory provisions relating to firearm ownership registration. *Id.* at 250 N.E.2d 129. There can be no doubt as to the repugnancy of Morton Grove Ordinance No. 81-11 as it directly contradicts an authorization recited in the state statutes. Additionally, the ordinance is inconsistent with the state regulatory scheme as prohibition is inconsistent with regulation. I would find no problem with Morton Grove requiring handgun registration similar to that involved in *Brown*. Registration and prohibition, by their very nature, seek to achieve different goals. Regulation through registration allows possession subject to reasonable limits while prohibition mandates an outright ban on possession.

As Morton Grove has impermissibly acted under its home rule powers vis-a-vis Ordinance No. 81-11, it is the obligation of this court to strike down the municipal enactment. Clearly, the creation of a *uniform* regulatory scheme concerning the possession of handguns is a matter of statewide, or even federal concern, which should not be disrupted by permitting this type of contradictory local action.

III.

I find today's decision particularly disturbing as it sanctions governmental action which I feel impermissibly interferes with basic human freedoms. I cannot let this opportunity pass without expressing my concern with the erosion of these rights.

The majority cavalierly dismisses the argument that the right to possess commonly owned arms for self-defense and the protection of loved ones is a fundamental right protected by the Constitution. Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), defined fundamental rights as those rights "implicit in the concept of ordered liberty." Surely nothing could be more fundamental to the "concept of *ordered* liberty" than the basic right of an individual, within the confines of the criminal law, to protect his home and family from unlawful and dangerous intrusions.

Article I, section 22 of the Illinois Constitution provides that subject to the "police power," the right of an individual to bear arms shall not be infringed. The United States Supreme Court has noted the difficulty in attempting to outline the parameters of a state's legitimate police power. In *Berman v. Parker*, 348 U.S. 26 (1954), addressing the concept of "police power," the Supreme Court stated that "an attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts." *Id.* at 33. The term is neither "abstractly nor historically capable of complete definition." *Id.* In enacting Ordinance No. 81-11, Morton Grove has gone beyond the "outer limits" of its legitimate police powers.

In *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 94 N.E. 920 (1911), the Illinois Supreme Court recognized that it is the responsibility of the courts to determine when constitutional limits have been exceeded in the enactment of police power legislation. It is the duty of the courts to determine whether there has been an "unreasonable invasion of private rights." *Id.* at 922.

> "Necessarily there are limits beyond which legislation cannot constitutionally go in depriving individuals of their natural rights and liberties. To determine where the rights of the individual end and those of the public begin is a question which must be determined by the court."

Id. 94 N.E. at 927.

In today's decision this court has refused to take cognizance of the natural right of an individual, within the confines of the criminal law, to protect his home and family from unlawful and dangerous intrusions. It is my opinion that Morton Grove Ordinance No. 81-11 impermissibly interferes with the rights of Illinois citizens to guard their personal security, subject to the limits of the criminal law, and that it is the duty of this court to so declare.

The court today has also refused to recognize the tremendous impact of Morton Grove Ordinance No. 81-11

on personal privacy rights. There is no doubt that the right to one's privacy is afforded constitutional protection. The United States Supreme Court has repeatedly recognized a right to privacy implicit in the federal constitution and Article I, section 6, of the Illinois Constitution expressly establishes a right to privacy. The Illinois provision has been interpreted by some members of the Illinois Supreme Court as creating a direct light to freedom from invasions of privacy by government or public officials. *See Stein v. Howlett*, 52 Ill.2d 570, 289 N.E.2d 409, 411, *appeal dismissed*, 412 U.S. 925 (1973).

The Morton Grove Ordinance, by prohibiting the possession of a handgun within the confines of the home, violates both the fundamental right to privacy and the fundamental right to defend the home against unlawful intrusion within the parameters of the criminal law. There is no area of human activity more protected by the right to privacy than the right to be free from unnecessary government intrusion in the confines of the home.

The unique importance of the home from time immemorial has been amply demonstrated in our constitutional jurisprudence. Among the enumerated rights in the Bill of Rights are the Third Amendment's prohibition of quartering of troops in a private house in peacetime and the right of citizens to be "secure in their . . . houses . . . against unreasonable searches and seizures . . ." guaranteed by the Fourth Amendment. As early as 1886, the United States Supreme Court recognized that the Fifth Amendment protects against all governmental invasions "of the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886). The First Amendment had been held to encompass the right to "privacy and freedom of association in the home." *Moreno v. United States Dep't of Agriculture*, 345 F.Supp. 310, 314 (D.D.C. 1972), *aff'd*, 413 U.S. 528 (1973).

In *Stanley v. Georgia*, 394 U.S. 557 (1969), the Supreme Court overturned a state conviction for possession of obscene material, holding "that the First and Fourteenth Amendments prohibit making the private possession of

obscene material a crime." The Supreme Court had previously held that obscenity is not protected by the First Amendment, but in *Stanley* the Court made a distinction between commercial distribution of obscene matter and the private possession of such materials in the home and held the Georgia statute unconstitutional because it prohibited the possession of such materials in the home. The Court recited:

> "For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."

Id. at 564.[12]

The Court has made it clear that its *Stanley* decision was not based on the idea that obscene matter is itself protected under the right of privacy. Rather, the focus in *Stanley* was on the fact that the activity prohibited by the Georgia statute occurred in the privacy of the home. In *United States v. Reidel*, 402 U.S. 351, 356 (1971), the Court rejected the argument that commercial distribution of pornography is constitutionally protected and held that the "focus" of *Stanley* was "on freedom of mind and thought and on the privacy of one's home." Subsequently, the Court in *United States v. Orito*, 413 U.S. 139, 142 (1973) stated "the Constitution extends special safeguards to the privacy of the home" and there exists a "myriad" of activities which may be prohibited in public but which may be lawfully conducted within the privacy and confines of the home.

Most importantly, the Supreme Court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 (1973), held that *Stanley* was decided "on the narrow basis of the 'privacy of the home' which was hardly more than a reaffirmation that '*a man's home is his castle.*'" (emphasis added).

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[12] I am aware of Justice Marshall's comments contained in footnote No. 11 of the *Stanley* decision. I believe however, as noted herein, that subsequent decisions of the Court have divested the footnote of any significance vis-a-vis this court's review of Morton Grove Ordinance No. 81-11.

Privacy in the home is a fundamental right under both the federal and Illinois Constitutions. This does not mean, of course, that a person may do anything at anytime as long as the activity takes place within a person's home. Instead, the right to privacy is limited in two important respects. First, the Supreme Court strictly limited its *Stanley* holding to possession for purely private, noncommercial use in the home. Second, as noted in *Stanley*, the right to privacy must yield when it seriously interferes with the public welfare. The government bears a heavy burden when attempting to justify an expansion, as in gun control, of the "limited circumstances" in which intrusion into the privacy of a home is permitted.

Morton Grove has not met that heavy burden. Without question, the state may, should and has placed reasonable restrictions on the possession of handguns outside one's home to protect the public welfare. However, Morton Grove's prohibition of handgun possession within the confines of a person's own home has not been shown to be necessary to protect the public welfare and thus violates the fundamental right to privacy.

The right to privacy is one of the most cherished rights an American citizen has; the right to privacy sets America apart from totalitarian states in which the interests of the state prevail over individual rights. A fundamental part of our concept of ordered liberty is the right to protect one's home and family against dangerous intrusions subject to the criminal law. Morton Grove, acting like the omniscient and paternalistic "Big Brother" in George Orwell's novel, "1984", cannot, in the name of public welfare, dictate to its residents that they may not possess a handgun in the privacy of their home. To so prohibit the possession of handguns in the privacy of the home prevents a person from protecting his home and family, endangers law-abiding citizens and renders meaningless the Supreme Court's teaching that "a man's home is his castle."

IV.

In summary, I believe a truly independent judiciary must exercise its powers with discretion and reservation, giving due deference to the other branches of government. Our judicial responsibility, however, obligates us to declare an act by another governmental unit to be void if we believe the enacted law is contrary to the principles of the Constitution. Because I believe that the Morton Grove Ordinance as enacted is contrary to the principles of the Constitution, I must respectfully dissent from the opinion of this court.

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Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VICTOR D. QUILICI, Plaintiff, -vs- VILLAGE OF MORTON GROVE, Defendant.	)	

ROBERT STENGL, et al., Plaintiffs, -vs- VILLAGE OF MORTON GROVE, et al., Defendants.	)	NOS. 81 C 3432 81 C 4086 81 C 5071 (Consolidated)

GEORGE L. REICHERT, et al., Plaintiffs, -vs- VILLAGE OF MORTON GROVE, Defendant.	)	

MEMORANDUM OPINION AND ORDER

This is a civil action challenging the constitutionality of a gun control ordinance passed by the Trustees of the Village of Morton Grove. On June 8, 1981, the Morton Grove Board of Trustees enacted Ordinance #81-11, entitled "An Ordinance Regulating the Possession of Firearms and Other Dangerous Weapons." (A copy of the ordinance is attached as an appendix.) In part, the ordinance provides that "no person shall possess, in the Village of Morton Grove ... [a]ny handgun, unless the same has been rendered permanently inoperative." The ordinance specifies various limited exceptions for certain individuals, such as peace officers, prison officials, and members of the armed forces and national guard. The ordinance also exempts licensed gun collectors and provides

that handgun owners are free to retain their operative handguns for recreational use, as long as the guns are kept and used on the premises of licensed gun clubs and certain other rules are met. Violation of the ordinance is punishable by fines of up to $500.00, and incarceration for up to six months for repeat offenders.

Consolidated here are three civil suits, filed shortly after the enactment of the ordinance, by several residents of Morton Grove.[1] The plaintiffs have alleged that the enforcement of the ordinance, which has been stayed pending this court's ruling on its validity, would violate both the Illinois and United States Constitutions. Both sides have moved for summary judgment on the issue of whether the ordinance, on its face, violates article 1, section 22 of the Illinois Constitution, or the Second, Fifth, Ninth or Fourteenth Amendments to the United States Constitution. Because the state constitutional issue is potentially dispositive, the court will first address the validity of Ordinance #81-11 under the Illinois Constitution.

The Right to Arms Under the Illinois Constitution

In 1970, a right to arms clause was included in the Illinois Constitution for the first time. Article 1, section 22 provides:

> *Right to Arms*
>
> Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.

The plaintiffs have contended that Morton Grove's ordinance impermissibly infringes upon that right, while the defendant claims that its action represents a valid exercise of the police power. Central to the court's resolution of this con-

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1. The four named plaintiffs, Victor D. Quilici, Robert Stengl, George L. Reichert, and Robert E. Metler, all allege that they own handguns as defined in the ordinance and would be adversely affected if the ordinance were upheld.

troversy is a determination of the meaning of section 22, itself.

Section 22, on its face, required a reconciliation of two competing notions of individual right and legislative prerogative. On one hand, it clearly recognizes the constitutional right of the individual "to keep and bear arms," and provides that the right "shall not be infringed." Yet, at the same time, the section expressly sanctions "constitutional infringements" of the right pursuant to the "police power," which is generally understood to mean the power of state and local governments to regulate *and even prohibit* conduct which perceived to be inimical to the safety, health and welfare of society. *People v. Warren*, 11 Ill.2d 420, 424-425 (1957). *Accord, Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530, 536 (1928); *Liquor Control Commission v. City of Calumet City*, 28 Ill. App. 3d 279, 283 (1st Dist. 1975).

The plaintiffs have advocated a broad and liberal interpretation of the individual right to keep and bear arms, and a restrictive view of the scope of the police power. That power, they insist, must not be interpreted in a manner which would allow it to circumscribe the individual right contained in section 22. The defendant disagrees. Morton Grove argues that since the individual right in section 22 is made expressly subject to the broad power of the legislature, that right should be construed narrowly, and the police power should be interpreted according to its usual and customary meaning, free from artificially-imposed restrictions. Because the language contained in section 22 itself offers no clue as to the proper reconciliation of these two competing concepts, the court finds it necessary to examine the provision's constitutional history, the source traditionally relied upon for the clarification of ambiguous constitutional provisions. *See Cosentino v. County of Adams*, 82 Ill.2d 565, 413 N.E.2d 870 (1980); *Client Follow-Up Co. v. Hynes*, 75 Ill.2d 208, 390 N.E.2d 847 (1979); *Wolfson v. Avery*, 6 Ill.2d 78, 126 N.E.2d 701 (1955); *Davis v. Attic Club*, 56 Ill. App.3d 58, 371 N.E.2d 903 (1st Dist. 1977).

While it is true that there are several sources upon which one might draw in reviewing the constitutional history of a

provision, "the practice of consulting the debates of the members of the convention ... has long been indulged in by courts as aiding to a true understanding of the meaning of provisions that are thought to be doubtful." *Burke v. Snively*, 208 Ill. 328, 344-345 (1904), quoted with approval in *Coalition for Political Honesty v. State Board of Elections*, 65 Ill.2d 453, 467 (1976); *Wolfson v. Avery*, 6 Ill.2d at 88; Davis v. Attic Club, 56 Ill. App.3d at 67-70. In this case, the court has found the delegates' debate on section 22 helpful to a meaningful reconciliaton of the individual's right to arms and the state's broad police powers.

Prior to the delegates' floor debate on section 22, the Bill of Rights Committee voted twelve to three to include the following right to arms provision in the new constitution:

> Subject only to the police power of the State, theright of the individual citizen to keep and bear arms shall not be infringed.

Vol. 6, *Record of Proceedings, Sixth Illinois Constitutional Convention* [hereinafter "*Proceedings*"] 84.[2] Leonard Foster, the spokesman for the majority of the committee, was responsible for explaining the provision to the delegates. Although his explanation necessitated a narrow construction of the individual's right to arms, Foster suggested a resolution of the apparent tension between the section's terms. According to Foster, section 22 stood only for the limited right of the individual citizen to keep and bear "some form" of firearm; and as long as the government, in the exercise of its police power, did not totally prohibit the possession of *all* firearms, the right

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2. In order to avoid any possible question as to whether the police power could be exercised by local governments, the delegates ultimately amended the proposed provision to delete the words "of the State" from the clause "Subject only to the police power." No challenge has been raised in this case regarding Morton Grove's ability as a local government to exercise that power.

provided for in section 22 was not violated. 3 *Proceedings* at 1687, 1689, 1718 (remarks of delegate Foster).

Although the right to arms described by delegate Foster might have appeared on its face to be evanescent, Foster told the convention that under the 1870 Illinois Constitution, which contained no right to arms provision at all, a total prohibition of firearms was possible, and that the proposed section was designed to do no more than eliminate that possibility:

> It could be argued that, in theory, the legislature now has the right to ban all firearms in the state as far as individual citizens owning them is concerned. That is the power which we wanted to restrict—an absolute ban on all firearms. Nothing further.

3 *Proceedings* at 1688. Later in the debate, Foster emphasized just how limited the proposed right to arms would be:

> [S]hort of an absolute and complete ban on the possession of all firearms, this provision would leave the legislature free to regulate the use of firearms in Illinois.
>
> * * *
>
> It is the position of the majority that under the police power of the state, the legislature would have the authority, for example, to forbid all handguns.

3 *Proceedings* of 1718 (order inverted). Foster characterized the committee as "very reluctant" to include any right to arms provision at all in the new constitution, 3 *Proceedings* at 1687, and indicated clearly in his remarks that once the committee finally decided to include such a provision, that provision was intended to be construed narrowly, and fully subject to the broad police power.

During the debate, several of the delegates questioned Foster specifically with respect to the meaning of the term

"police power" in the context of section 22, and any limitations which section 22 might impose upon the legislature. Foster was equivocal: Section 22 would restrain no exercise of the legislature's power short of an absolute ban on all firearms. That statement prompted the following exchange:

> MR. FAY: Well, is that the extent of it?
> MR. FOSTER: This is the extent of it, Mr. Fay.
>
> * * *
>
> MRS. LEAHY: For a while, I had thought that perhaps the proposal might be a nullity—that you granted the right, but it could be taken away under the police power. According to your answer to the question asked by Mr. Fay, there is one exception to the police power [being] exercised, and that would be the total taking away?
> MR. FOSTER: Right.
>
> * * *
>
> MRS. LEAHY: Well, then you have total abolition and total right; and somewhere in between there, there are gradations.
> MR. FOSTER: No, we don't have total abolition versus total right. We have total abolition versus limited right—right limited by the police power extending up to but not including total abolition.
> MRS. LEAHY: Anything short of total abolition [that] is justified as reasonable for the safety, then, would be approved under your proposal?
> MR. FOSTER: Yes, in the opinion of the majority.

3 *Proceedings* at 1688. Clearly, section 22 was presented to the delegates as recognizing a narrow individual right which was subject to substantial legislative control.

From a review of the remarks of the delegates which followed Foster's explanation, it is clear that whatever their individual feelings about the right to arms, there was very little disagreement about the effect of making that right subject to

the police power. As the debate progressed, two principal views emerged with respect to the meaning of the right to arms provision in section 22. One group of delegates supported the section, and seemed to adopt the view of the majority of the committee that section 22 represented only a narrow right, and limited virtually no exercise of the police power short of a total ban on all firearms. Typical of this group was delegate Durr:

> [H]andguns are by far and away the problem in this country and in this state, where there is a problem with firearms or arms of any kind. This document [Section 22] does not in any way attempt or intend, as I read it and as I suspect the courts would read it—and I've done some research on this—would not restrict the state or the county or the city or any other government within the confines of a reasonable—that is the key word, reasonable—control over handguns. And I submit to you that that would include the prohibition, if they reasonably determine that handguns were an undue hazard.

3 *Proceedings* at 1717-1718. See also 3 *Proceedings* at 1709 (remarks of delegate Elward: "the plain language of the majority proposal ... denies almost nothing that the General Assembly or any city council could do in the future.").

A second group of delegates saw little distinction between a limited right to keep "some form" of arms, and no right to arms at all. While in apparent agreement with the committee view that section 22 provided very little protection of an individual's rights in the face of a proper exercise of the police power, this group criticized the majority provision as being totally illusory. *E.g.*, 3 *Proceedings* at 1697 (remarks of delegate Weisberg). Some of those delegates favored no right to arms provision at all, and voted for the minority proposal to exclude any right to arms provision from the constitution. *E.g.*, 3 *Proceedings* at 1708 (remarks of delegate Friedrich: "Frank-

ly, I don't think what we're putting in ... is strong enough ... [M]any of [the states'] constitutional provisions are much more enabling than the one that's proposed here."); 1704 (remarks of Father Lawlor, proposing, *inter alia*, the removal of the term "police power" from the provision). Most of those delegates acknowledged that the inclusion of the term 'police power' substantially undercut the right to arms. To the extent that one looks to the convention debate for assistance in reconciling the conflict between the right to arms and exercise of the police power, the debate clearly supports a narrow construction of the individual right.

The plaintiffs, in urging the court to reject a narrow construction of the right to arms, have sharply criticized any significant reliance on the constitutional debates. First, they argue that emphasis on the debates is misplaced because the true inquiry in resolving constitutional ambiguities is to determine "the understanding ... by the voters who, by their vote, have given life to the product of the convention." *Consentino v. County of Adams*, 82 Ill.2d at 569. *See also Client Follow-Up Co. v. Hynes*, 75 Ill.2d at 222; *Wolfson v. Avery*, 6 Ill.2d at 88. *But see Winokur v. Rosewell*, 83 Ill.2d 92, 100-102 (1980) (relying on framers' intent to clarify ambiguous constitutional provision).[3] To determine the voters' understanding, the plaintiffs have requested the court to consider such additional sources as: (1) The Official Explanation of section 22 which was provided to the voters prior to ratification of the constitution; (2) Newspaper articles written at around the time of the ratification vote discussing the right to arms provisions; and (3) The

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3. It must be emphasized that the cases relied upon by the plaintiffs do not support outright rejection of the delegates' debate as a source of information, but only suggest the consideration of alternative sources as an aid to resolving constitutional ambiguities. *See Client Follow-Up Co. v. Hynes*, 75 Ill.2d at 220: "When the meaning of provisions of the constitution are in doubt, it is appropriate to consult the debates of the delegates to the constitutional convention to ascertain the meaning which they intended to give those provisions." *See also, Wolfson v. Avery*, 6 Ill.2d at 88.

"plain meaning" which ordinary voters might have attributed to the term "police power." None of those sources, however, meaningfully addresses the reconciliation of individual right and legislative power which section 22 requires.

The "Official Text of the Proposed 1970 Illinois Constitution with Explanation" provides:

> Section 22 *Right to Arms*
>
> Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.
>
> *Explanation*
>
> This new section states that the right of the citizen to keep and bear arms cannot be infringed, except as the exercise of this right may be regulated by appropriate laws to safeguard the welfare of the community.

Even taking the "Official Explanation" into consideration, the court is unconvinced of the plaintiffs' position. Far from reconciling the tension between the exercise of the individual right and the exercise of the police power, the above explanation begs the question. Like the text of the section itself, the explanation offers no clue as to the limits on the police power. *See Davis v. Attic Club*, 56 Ill. App.3d at 67 (rejecting reliance on the "Official Explanation of the 1970 Proposed Constitution" as being too conclusory and superficial).

Similarly, the court can find no meaningful reconciliation of the two concepts in the Chicago Tribune article of December 13, 1970, which referred to the new right only sketchily as a "new right ... to keep and bear arms," and summarize section 22 as providing "a guarantee of the individual's right to own firearms." No attention at all is devoted to the critical issue of interpretation as to the limit on the police power.

Finally, the suggestion that the right to arms warrants a liberal reading because that is how "the people" would read it

must be rejected. According to this argument, the voters did not understand the full import of the term "police power" when they ratified the constitution. Instead, they most likely thought that they were ratifying a broad right to arms, one which would not tolerate a total handgun ban. Therefore, the plaintiffs argue that the court should give effect to the public's perception of the right rather than its actual meaning. The court cannot agree. Section 22 says explicitly that the individual right is subject to the police power. The Illinois Supreme Court has defined that term to include the power "to prohibit." *People v. Warren*, 11 Ill.2d at 424-425. Sound principles of construction require that "in those instances in which [the Illinois Supreme Court], prior to the adoption of the constitution of 1970, has defined a term found therein, that it be given the same definition, unless it is clearly apparent that some other meaning was intended." *Bridgewater v. Hotz*, 51 Ill.2d 103, 109 (1972). The plaintiffs' arguments to the contrary are incorrect.

The plaintiffs' final attack on the debates concerns the conflict between certain language in the Bill of Rights Committee majority report on section 22 and the position taken by the committee on the floor of the convention. The plaintiffs refer the court to the following language in the report:

> The substance of the right [contained in Section 22] is that a citizen has the right to possess and make reasonable use of arms that law-abiding persons commonly employ for purposes of recreation or the protection of person and property. Laws that attempted to ban all possession or use of such arms, or laws that subjected possession or use of such arms or laws that subjected possession or use of such arms to regulations or taxes so onerous that all possession or use was effectively banned, would be invalid."

6 *Proceedings* at 87, *citing People v. Brown*, 253 Mich. 537, 541-542, 235 N.W. 245, 246-247 (1931); *State v. Duke*, 42 Tex.

455, 458 (1875); *In re. Brickey*, 8 Idaho 597, 70 P. 609 (1902); *People v. Zerillo*, 219 Mich. 635, 189 N.W. 927 (1922); *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921). The plaintiffs argue first that those cases, decided under other states' constitutions, support their conclusion that the police power should be read restrictively. Second, they argue that the mere fact that those cases were included in the committee report serves as an indication of the delegates' intent that the police power should be narrowly construed, contrary to the intent expressed on the convention floor. The court rejects both of these arguments.

While the language used in some of these cases supports the text used in the report, the cases themselves were decided under distinctly different constitutional provisions. *In re Brickey*, for example, was decided 80 years ago, under a state constitutional provision which stated:

> The people have the right to bear arms for security and defense, but the legislature shall regulate the exercise of this right by law.

70 P. at 609. In its opinion in *Brickey*, the Supreme Court of Idaho held only that the inclusion of the term "regulate" in the Idaho Constitution did not permit the legislature to prohibit persons from carrying firearms. *Id.* The framers of the Illinois Constitution did not choose to use the term "regulate" to limit the Illinois right to arms. Instead, they used the expression 'subject to the police power,' which the Illinois Supreme Court had already held to include the power to prohibit. *See People v. Warren*, supra. In fact, the Illinois Supreme Court had already stated that the police power specifically included the power to prohibit firearms. *Biffer v. City of Chicago*, 278 Ill. 562 (1917). By including an express police power limitation, the Illinois right to arms provision is simply different from those of the other states.

A further distinction between section 22 and the other provisions is that the Illinois right to arms provision has a clear constitutional history which supports a narrow reading of the right

to arms. No such constitutional history is mentioned in the two-paragraph *Brickey* opinion, or in the other cases cited by the plaintiffs. *E.g., State v. Kerner,* supra. For these reasons, the court finds the cases decided under other states' constitutional provisions unpersuasive in this case.

Although the cases decided under other states' constitutions were mentioned in the committee report, little can be concluded merely from the fact of their mention in the report. For, on the very page following its citation of *In re Brickey,* the report quoted with approval the following language from the Illinois Supreme Court opinion in *Biffer v. City of Chicago:*

> It is clear, under the authorities, that the sale of deadly weapons may be absolutely prohibited under the police power of the State, and to do this in no way conflicts with the provision of the constitution of the United States and of various state constitutions that "the people have a right to bear arms for their defense and security."

278 Ill. at 570. 6*Proceedings* at 88. The majority report then added:

> Because arms pose an extraordinary threat to the safety and good order of society, the possession and use of arms is subject to an extraordinary degree of control under the police power.

6 *Proceedings* at 88. Contrary to the plaintiffs' arguments, the views contained in the committee report are certainly consistent with the narrow reading of the right to arms expressed so clearly by the delegates on the floor of the convention.[4]

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4. Similarly, the report's failure to list a handgun ban among its illustrations of such applications of the police power is not necessarily inconsistent with the committee's view during the debate. The report explicitly indicated that its list of illustrations was intended to be nonexhaustive.

Nothing in the committee report persuades the court to disregard the clear expression of the delegates' intent contained in the debates.

After carefully reviewing the constitutional history of section 22, including the actual language used in the provision, the text of the convention debates, the committee report, and the other sources discussed above, the court concludes that the right to arms in Illinois is so limited by the police power that a ban on handguns does not violate that right. On at least five occasions, the convention debates indicated that such a ban would not be unconstitutional, 3 *Proceedings* at 1687, 1689, 1693, 1718, and the court agrees with that assessment. Furthermore, the court concludes that as long as a law does not totally an all firearms, it must only qualify as a valid exercise of the police power in order to survive constitutional challenge under section 22. Therefore, the narrow question remaining for the court is whether Morton Grove's enactment was a proper exercise of the police power.

By banning the possession of handguns by private citizens within its borders, Morton Grove has gone further than either the state legislature or any other municipality in gun regulation, either before or after the inclusion of a right to arms in the Illinois Constitution. Therefore, it is necessary to give extremely careful consideration to the permissible limits of the police power as applied to the sweeping provisions of this ordinance.

Despite the fact that no other court has been called upon to consider a handgun ordinance of this scope, this court, when considering the police power of the state or municipality, is not writing on a blank slate. The Illinois Supreme Court has recently considered and restated the guiding principles by which this court must be led in its review of an enactment under the police power. See *City of Carbondale v. Brewster*, 78 Ill.2d 111 (1979), *appeal dismissed*, 446 U. S. 931 (1980). The *Carbondale* court stated the following:

> The police power may be exercised to protect the public health, safety, morals, and general welfare or

> convenience ... To be a valid exercise of police power, the legislation must bear a reasonable relationship to one of the foregoing interests which is sough to be protected, and the means adopted must constitute a reasonable method to accomplish such objective ... Although the determination of reasonableness is a matter for the court, the legislature has broad discreation to determine not only what the interests of the public welfare require but what measures are necessary to secure such interest ... The Court will not disturb a police regulation merely where there is room for a difference of opinion as to its wisdom, necessity and expediency. Id. at 114-115 (citations omitted).

See also People v. Haron, 85 Ill.2d 261, 279-280 (1981) ("[T]he standard of a proper exercise of the police power is whether the statute is reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety and general welfare."(citation omitted)).

Certainly, there can be no question that the Morton Grove ordinance is oriented to those interests which are proper aims of any exercise of the state's police power. The preamble to the ordinance demonstrates that the public health and safety were uppermost in the minds of the Trustees of Morton Grove. The preamble states:

> WHEREAS, it has been determined that in order to promote and protect the health and safety and welfare of the public it is necessary to regulate the possession of firearms and other dangerous weapons, and
>
> WHEREAS, the Corporate Authorities of the Village of Morton Grove have found and determined that the easy and convenient availability of certain types of firearms and weapons have increased the poten-

tiality of firearms related deaths and injuries, and

WHEREAS, handguns play a major role in the commission of homicide, aggravated assault, and armed robbery, and accidental injury and death.

The public health and safety are proper police power objectives. Illinois courts have consistently held firearms controls to be within the purview of the police power. *See Brown v. City of Chicago*, 42 Ill.2d 501 (1969) (declaring Chicago firearms registration ordinance valid); *Biffer v. City of Chicago*, supra (declaring Chicago ordinance restricting sale of concealable weapons valid); *Rawlings v. Department of Law Enforcement*, 73 Ill.App.3d 267 (3d Dist. 1979) (declaring Illinois statute prohibiting, *inter alia*, former mental patients from obtaining gun licenses to be a valid exercise of the police power); *People v. Williams*, 60 Ill.App.3d 726 (1st Dist. 1978) (declaring Illinois concealed weapons statute valid). Here, too, the court concludes that Morton Grove's firearms ordinance is properly related to the public health and safety.

The above finding that the interests sought to be protected by the Trustees of Morton Grove may properly be the targets of an exercise of the police power does not end this court's inquiry. The question remains whether the Morton Grove ordinance, which effectively bans the possession of any handguns, is a reasonable method of promoting the interests of public health and safety.

The plaintiffs suggest in the strongest possible terms that this requirement for a proper exercise of the police power has not been met here. They argue that the ordinance does not reflect a reasonable response to the problems of weapons misuse, but rather is an arbitrary and simplistic response, resulting in an unreasonable and capricious exercise of the police power.

Morton Grove defends its ordinance as a reasonable legislative response to the very serious problem of handguns in our society, and disputes the characterization of its or-

dinance as a total prohibition of firearms, or even handguns. By its terms, the ordinance (1) excludes "long guns" such as shot guns and rifles from its proscriptions; (2) exempts certain individuals, such as peace officers, members of the armed forces, and licensed gun collectors, from many of the ordinance's restrictions; and (3) allows the continued recreational use of handguns under certain conditions, at licensed gun clubs. The inclusion of those exceptions, the Village argues, indicates that the Trustees attempted to construct an ordinance broad enough to effectuate its objective of protecting public safety without unnecessarily restricting the possession and use of firearms.

In reviewing the reasonableness of Morton Grove's ordinance, it is necessary to recognize certain important limitations on the court's review function. First, it is not the role of the court to test the factual validity of the findings which support an exercise of the police power. That is a uniquely legislative responsibility. The Illinois Supreme Court made this very clear when it ruled on the validity of Chicago's gun registration ordinance in 1969:

> "Plaintiffs argue at length that strict gun laws do not tend to reduce crime, and statistics and excerpts from reports of surveys are quoted to show that legal restrictions are easily circumvented by experienced criminals .... These arguments, whatever validity they might have, are not appropriately addressed to this court. They relate to matters of legislative instead of judicial concern, and bear on the advisability of the present provisions rather than on their validity."

Brown v. City of Chicago, 42 Ill.2d at 507. This court is not free, in reviewing Morton Grove's ordinance, to re-examine and reweigh the evidence upon which the legislative decision was premised.

In addition, the court is not to decide whether the means

selected by the legislature are the best way to deal with the perceived problem, or whether other alternatives available would have been better. As quoted above, "The court will not disturb a police regulation merely where there is room for a difference of opinion as to its wisdom, necessity, and expedience." *City of Carbondale*, 78 Ill.2d at 115. *See Memorial Gardens Assoc. v. Smith*, 16 Ill.2d 116, *appeal dismissed*, 361 U.S. 31 (1959); *State Dental Society v. Sutker*, 76 Ill.App.3d 240 (1st Dist. 1979), *cert. denied*, 447 U.S. 930 (1980).

The appropriate test is one of arbitrariness. *City of Carbondale*, 78 Ill.2d at 115. A prediction that the present ordinance may not be a panacea for all of the problems arising from the possession and use of handguns would not prove the plaintiffs' contention that this ordinance is arbitrary and simplistic. If the present ordinance was adopted on the expectation of the Trustees that it would serve to inch the Morton Grove community one step further to becoming peaceable and safe, this would justify the use of the police power. Many social experiments have only small beginnings.

The issue of whether or not private citizens should be allowed to possess handguns freely, whether for their own defense or for other purposes, has constantly been in the political arena. Plaintiffs themselves have presented substantial material to this court showing that the question was controversial in England as early as the 1600's. Certainly it was a very important issue in the debates of the Illinois Constitutional Convention, as is shown by the preceding review of those debates. The Trustees of the Village of Morton Grove could not have been unaware of the existence of the handgun debate.

In addition, the Morton Grove Trustees were entitled to take notice of a recent Illinois case in which the instant provision of the Illinois Constitution was discussed. *People v. Williams*, *supra*, involved a prosecution under the Illinois Criminal Code for knowing possession within a city of "any loaded pistol, revolver or other firearm." 60 Ill.App.3d at 727. An exception in that statute allowed possession by an individual in his own home or place of business. The defendant in that case had in

his possession a .32-caliber pistol loaded with four rounds of live ammunition and one spent round. The Illinois Appellate Court had no difficulty in finding that the Criminal Code provision was a reasonable exercise of the police power, because the state had a valid interest in controlling crime within its borders. *See also, Rawlings v. Department of Law Enforcement, supra.*

In addition to controlling crime, the Trustees also stated in the preamble that they were attempting to reduce the incidence of handgun related accidents. The Trustees needed only to read the daily papers to have been aware of the large number of tragic accidents involving the use or misuse of handguns in the home. Furthermore, it cannot be ignored that there is some support for the link between accidental injuries and handguns, specifically. As one commentator observed:

> "The handgun—long gun distinction is founded both in the existence of legitimate recreational uses of long guns and on perceived empirical evidence that long guns are not misused nearly as frequently as handguns."

Comment, *The Impact of State Constitutional Right to Bear Arms Provisions on State Gun Control Legislation*, 38 U.Chi.Rev. 185, 207 (1970). Certainly, the Village has a valid interest in attempting to reduce the possibility of firearms catastrophes in Morton Grove. A ban on the possession of handguns in the home cannot be considered an unreasonable response to that problem, and may in fact be the only method of attaining the goal sought by the Trustees.

In addition to claiming that Morton Grove's exercise of its police power is "arbitrary and simplistic," plaintiffs also argue that the ordinance is invalid because it is a prohibition of the possession of handguns, rather than a regulation of their use. Plaintiffs rely on *In re Brickey, supra*, and *Andrews v. State*, 50 Tenn. 165 (1871), to suggest that the police power does not include the power to prohibit.

That argument by the plaintiffs misstates current Illinois law. As stated above, the police power does include the power to prohibit. "In the exercise of its inherent police power, the legislature may enact laws regulating, restraining *or prohibiting* anything harmful to the welfare of the people, even though such regulation, restraint *or prohibition* interferes with the liberty or property of an individual." *People v. Warren*, 11 Ill.2d at 424-425 (emphasis added). *See Biffer v. City of Chicago, supra; Liquor Control Commission v. City of Calumet City, supra.*

Given that the Morton Grove ordinance is a reasonable response to the problems seen by the Trustees, it is not automatically invalid because it is a prohibition rather than a regulation.

In sum, this court concludes that the Morton Grove ordinance has as its basis the proper goals of protecting the safety and health of the people. In addition, the court finds that the ordinance does not represent a complete ban on firearms, and is reasonable and neither arbitrary nor simplistic. The ordinance was both properly and validly enacted under Morton Grove's police power. Therefore, the court concludes that ordinance #81-11 does not violate any of the plaintiffs' rights under the Illinois Constitution.

United States Constitutional Issues

In addition to their claims under the Illinois State Constitution, the plaintiffs also argue that the Morton Grove ordinance violates the United States Constitution, specifically the Second, Fifth, Ninth and Fourteenth Amendments.

A. *Second and Fourteenth Amendments*

The Second Amendment provides as follows:

> A well regulated Militia, being necessary to the security of a free State, the right of the peo-

> ple to keep and bear Arms, shall not be infringed.

The plaintiffs rely substantially on historical arguments to buttress their contention that the Morton Grove ordinance infringes upon that Amendment. They review (1) the common law background of the right of individuals to possess weapons; (2) the impetus for the Second Amendment, which was the constitutional framers' fear that a national standing army would be inimical to personal rights and liberties; and (3) pre-Civil War judicial decisions in which the individual's right to bear arms was considered. Based on those materials, plaintiffs conclude that the Second Amendment conferred an individual right to keep and bear arms, including handguns, as opposed to a collective right in the states to maintain a militia separate from the federal standing army. After reaching that conclusion, plaintiffs then review the history of the Fourteenth Amendment and suggest that its framers intended that the Second Amendment should apply to the actions of the states.

Defendant Morton Grove's main response to plaintiffs' arguments is extremely simple. The Village points to the Supreme Court's decision in *Presser v. Illinois*, 116 U.S. 252 (1886), in which the Court held that the prohibitions of the Second Amendment limited only the power of the United States Congress, and not the power of the individual states. Since this court is bound by the pronouncement of the Supreme Court, the Village argues that plaintiffs' contentions are largely irrelevant. In the alternative, Morton Grove also controverts the specific arguments made by the plaintiffs. The defendant claims that the Second Amendment does not create an individual right, but merely prohibits legislation that would impair the states' right to have a militia. *See, United States v. Miller*, 307 U.S. 174 (1939). Also, the Village specifically refutes each of the plaintiffs' arguments, contending that they are not supported by common law traditions, the history of the Second Amendment, early state court decisions, or the statements of the framers of the Fourteenth Amendment. While some of

those arguments are persuasive, there is no purpose in considering them further in view of the controlling *Presser* decision.

At issue in *Presser* was an Illinois statute which forbade private organizations from parading with arms in any city or town of the state, without a license from the Governor. Presser was convicted and fined for violating the statute. On Appeal to the Supreme Court, Presser claimed that the Illinois provision infringed his Second Amendment right. The Court rejected that argument, stating as follows:

> [A] conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States. It was so held by this court in the case of *United States v. Cruikshank*, 92 U.S. 542, 553, in which the Chief Justice, in delivering the judgment of the court, said, that the right of the people to keep and bear arms
>
> > "is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes to what is called in *The City of New York v. Miln*, 11 Pet. [102] 139, the 'powers which relate to merely municipal legislation, or what was perhaps more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States."

Id. at 265. The obvious holding of *Presser* is that the Second Amendment was not incorporated into the Fourteenth, and that it does not serve as a check on the power of the state legislature or municipal councils in Illinois.

The Supreme Court has never reconsidered its holding in *Presser*. Consequently, that opinion stands as the Supreme Court's most recent pronouncement on the issue of whether the Second Amendment was incorporated into the Fourteenth Amendment so as to limit the power of the states. It is a truism that the district court is bound by the holdings of the Supreme Court to the extent that they bear on questions before the district court. *Hendricks County Rural Electric Membership Corp. v. NLRB*, 627 F.2d 766 (7th Cir. 1980), *rev'd on other grounds*, 50 U.S.L.W. 4037 (1981). That rule applies irrespective of the age of the Supreme Court opinion, the district judge's personal opinion of the validity of the Supreme Court's action, or whether he believes the Supreme Court would rule as it did if the issue were again before it. *United States v. Chase*, 281 F.2d 225 (7th Cir. 1960); *Sullivan Outdoor Advertising, Inc. v. Department of Transportation*, 420 F.Supp. 815 (N.D.Ill. 1976).

Plaintiffs make two principal arguments in urging that this court not follow the holding in *Presser*.[5] They argue first that *Presser*, when read properly, actually supports, rather than contradicts, their contention that the ordinance is unconstitutional. Second, they claim that irrespective of how *Presser* is read, it is no longer good law; in effect saying that the later cases incorporating several of the first ten amendments into

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5. Plaintiffs' other arguments, urging this court to find that the ordinance infringes the Second Amendment, include claims based on the history of the Fourteenth Amendment, the general change in the viewpoint of the Supreme Court concerning the issue of incorporation and early state cases addressing the individual's right to bear arms. Those arguments would require the court, if it accepted them, to reach a decision contrary to the holding in *Presser*. Since this court has no power or authority to do that, the arguments are irrelevant here.

the Fourteenth Amendment overrule *Presser sub silentio*. Neither of those arguments is persuasive.

Plaintiffs seize upon the phrase in *Presser* that "the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms ...," 116 U.S. at 265, to support their argument that defendant has misread that decision. When the phrase is read in context, however, it actually supports Morton Grove's position in this case, not the plaintiffs'.

The entire phrase referred to above, from which the plaintiffs have relied on but a portion, reads as follows:

> [T]he States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

Id. Plaintiffs here have not suggested that the Morton Grove ordinance in any way interferes with the ability of the United States to maintain public security, nor could they make an argument to that effect. Irrespective of the Constitutional framers' fear of a national standing army, the United States currently has one and relies upon it, not upon armed private citizens, to maintain public security.

In relying upon the above quoted phrase, plaintiffs also overlook the immediately previous sentence in *Presser*, in which the Supreme Court cites *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837). At the place cited to in *Presser*, the Court in *Miln* said the following:

> [A] state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the

> constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.

36 U.S. (11 Pet.) at 139 (emphasis in original). Read in context, the phrase referred to by the plaintiffs was not meant to be a limitation on the authority of the states, but merely stated the obvious position that, whenever required by the federal government or absent any regulation whatsoever, an individual has the right to keep and bear arms. Under certain circumstances, that right may be limited by the states through the valid exercise of what has come to be known as the "police power," without fear that any United States Constitutional provisions will be infringed. As was discussed at length above in this court's review of the Illinois Constitution, the Morton Grove ordinance is a valid exercise of the police power. *Presser* requires no more than that.

Plaintiffs' second argument, that *Presser* has been overruled *sub silentio* by later decisions of the Supreme Court is equally unavailing. In their memorandum on this position, plaintiffs rely substantially on Justice Black's dissenting opinion in *Adamson v. California*, 332 U.S. 46 (1947) (Black, J., dissenting). Although three other Justices concurred with Justice Black that the Bill of Rights, in its entirety, should be incorporated into the protections offered by the Fourteenth Amend-

ment, that position has never been accepted by a majority of the Supreme Court. *See* L. Tribe, *American Constitutional Law* §11-2 (1978). That situation is underscored by the fact that some provisions of the Bill of Rights, in additon to the Second Amendment, have never been held to apply to the states. *See Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977) (Fifth Amendment right to indictment by a grand jury); *Iacaponi v. New Amsterdam Casualty Co.*, 258 F.Supp. 880 (W.D. Pa. 1966), *aff'd*,379 F.2d 311 (3d Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968) (Seventh Amendment right to a jury trial in civil cases).

The language in *Malloy v. Hogan*, 378 U.S. 1 (1964), quoted by the plaintiffs, is not to the contrary. In that case, the Supreme Court rejected "the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights'." 378 U.S. at 10-11, (quoting from *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960) (Brennan, J., dissenting). That statement was not intended by the Court to be a wholesale incorporation of the Bill of Rights into the Fourteenth Amendment, but rather to give content to a particular right that had already been incorporated. Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan, J., dissenting), also fails to provide any support to plaintiffs here. While Justice Harlan did recognize that the right to keep and bear arms was protected by the Bill of Rights, he was careful to note that the Supreme Court has consistently resisted the notion that the Fourteenth Amendment was merely a shorthand reference to what was set out in the Bill of Rights. *Id.* at 541.

Presser directly bears on the issue of whether the states or their political subdivisions are limited by the Second Amendment, and it is still good law, notwithstanding plaintiffs' arguments to the contrary. *Presser* controls this court and, therefore, requires it to hold that the Second Amendment does not apply to the states and localities and so is not infringed by the Morton Grove ordinance. Numerous state and lower federal courts who have considered the issue agree with this conclusion. *See Cases v. United States*, 131 F.2d 916 (1st Cir.

1942), *cert. denied*, 319 U.S. 770 (1943); *Eckert v. City of Philadelphia*, 329 F.Supp. 845 (E.D.Pa. 1971), *aff'd*, 447 F.2d 610 (3d Cir.), *cert. denied*, 414 U.S. 843 (1973); *In re Atkinson*, 291 N.W.2d 396 (Minn. 1980); *State v. Amos*, 343 So.2d 166 (La. 1977); *Commonwealth v. Davis*, 369 Mass. 886, 343 N.E.2d 847 (1976); *State v. Sanne*, 116 N.H. 583, 364 A.2d 630 (1976); *Harris v. State*, 83 Nev. 404, 432 P.2d 929 (1967); *State v. Swanton*, 129 Ariz. 131, 629 P.2d 98 (Ct.App. 1981).

B. *Ninth Amendment*

The Ninth Amendment to the United States Constitution provides:

> The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Plaintiffs' arguments under this provision center on a claimed right to self defense. They suggest that the right to bear arms for the purpose of self defense was recognized by several famous natural law philosophers, among them Aristotle, Cicero, and John Locke. Cicero, for instance, noted, "if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right." Cicero, *In Defense of Titus Annius Milo*, Selected Political Speeches 222 (M. Grant trans. 1969). In addition, plaintiffs point to several early court decisions under the English common law, which recognized the right of individuals to keep and use weapons for personal defense and defense of the home.

Although plaintiffs' arguments have an understandable facial appeal, the court is unable to accept the argument that this claimed right is protected by the Ninth Amendment.

Neither plaintiffs, the defendant, nor this court has discovered a single instance in which the Supreme Court has explicitly held that particular right was protected by the Ninth Amendment. In the situations where the Court has given pro-

tection to individual rights not explicitly listed in the first ten amendments, it has relied on "penumbras, formed by emanations from those guarantees that help give them life and substance." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The only rights so recognized by the Court have involved the truly personal and private rights relating to questions of family and procreation. *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold, supra*. Never has the Court recognized anything like a right to self defense, or a right to carry handguns, based either on the penumbra theory or directly under the Ninth Amendment.

The only explicit discussion in any Supreme Court opinion of the Ninth Amendment and its reach appears in the concurrence by Justice Goldberg in *Griswold*, 381 U.S. at 486-499. Justice Goldberg argued that there were certain fundamental rights, arising from the "traditions and [collective] conscience of our people," *id.* at 493 (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)), which required the protection of the Ninth Amendment. Whatever the appeal of such an analysis, Justice Goldberg's thesis has never been accepted by a majority of the Supreme Court. The Ninth Amendment furnishes no support for the plaintiffs' fundamental right argument. The Morton Grove ordinance does not violate its provisions.

C. Fifth Amendment

Plaintiffs Quilici and Stengl both alleged in their complaints that the Morton Grove ordinance infringed the Fifth Amendment, which prohibits the taking of private property for public use, "without just compensation." Plaintiffs appear to have abandoned that argument, by failing to discuss it in their memoranda of law filed with this court. Nonetheless, for the sake of completeness, the court will address it briefly.

It is well established that a Fifth Amendment taking can occur through the exercise of the police power regulating property rights. In order for a regulatory taking to require compensa-

tion, however, the exercise of the police power must result in the destruction of the use and enjoyment of a legitimate private property right. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Devines v. Maier*, No. 80-2315 (7th Cir. November 23, 1981). The Morton Grove ordinance does not go that far. The geographic reach of the ordinance is limited; gun owners who wish to may sell or otherwise dispose of their handguns outside of Morton Grove. *See Fresjian v. Jefferson*, 399 A.2d 861 (D.C. 1979). If handgun owners do not wish to sell their weapons, they may simply register and store them at a licensed gun club. Finally, the ordinance has an exception for licensed collectors, for whom neither of those two alternatives may be acceptable.

D. *Vagueness*

In his memorandum, plaintiff Quilici implies that the ordinance is unconstitutionally vague. He suggests specifically that the ordinance's definition of "handgun" as "a firearm of a size which may be concealed upon the person" might apply to shotguns and rifles in an unpredictable manner.

The conditions under which vagueness challenges to a statute may be considered have been clearly set out by the Supreme Court. "It is well-established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined by the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). *See United States v. McCauley*, 601 F.2d 336 (8th Cir. 1979); *United States v. Howard*, 569 F.2d 1331 (5th Cir.), *cert. denied*, 439 U.S. 834 (1978). Plaintiff has failed to present an issue of the meaning of the statute as it applies to any weapon possessed by him. Rather, plaintiff, in his complaint, alleges that he owns handguns which are subject to the strictures of the ordinance. It is obvious that the ordinance gives Mr. Quilici "adequate warning" that his conduct would be illegal. *United States v. Powell*, 423 U.S. 87, 93 (1975).

Conclusion

Perhaps the clearest fact that emerges from this litigation is that the issue of gun control, in whatever form, is controversial. Reasonable people can, in good conscience, oppose what Morton Grove has done, while equally reasonable people can fully support this ordinance. Perhaps nowhere else is that situation more clearly demonstrated than in the lengthy and well thought out briefs filed by the opposing parties in this case.

After full consideration, the court has concluded that the Morton Grove ordinance was properly enacted pursuant to the police power, and that it does not infringe upon the rights guaranteed by the United States Constitution. Although those legal questions decided by this court will reach finality at some point in time, the debate over the wisdom of this legislation will continue. Article 1, section 22 of the Illinois Constitution was drafted and presented to the voters of Illinois as a reflection of the conflicting views of the delegates. The voters of Illinois then approved the new Constitution with the express provision that the right to bear arms would be subject to the police power. The Trustees of Morton Grove, also acting in an atmosphere of public debate and conflict, have made a legislative decision that the danger posed by the easy availability of handguns is serious enough to warrant the banning of all handguns within this particular community. Before taking this action, the Morton Grove Trustees must have been aware of the deep-seated conviction of a number of its citizens that they should be permitted to retain handguns for the protection of person and property. The Trustees concluded, however, that the public interest outweighed the claimed personal interests of the opponents of this legislation. The ultimate settlement of this troublesome political question must be returned to the citizens of Morton Grove where it properly belongs rather than in the courts.

For all the reasons stated above, the court finds that the Morton Grove ordinance is valid. It does not infringe any of the

provisions of either the Illinois State Constitution or the United States Constitution. Therefore, defendant's motion for summary judgment is granted, and plaintiffs' motions are denied. The stay precluding enforcement of the ordinance is hereby lifted.

ENTER:

/s/ (Bernard Decker)

United States District Judge

DATED: December 29, 1981.

APPENDIX C

Opinion by Judge Bauer

Judge Coffey dissenting

JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 6, 1982.

Before

Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. John L. Coffey, Circuit Judge

VICTOR D. QUILICI, ROBERT STENGL, et al.,
GEORGE L. REICHERT, and ROBERT E. METLER,
Plaintiffs-Appellants,

Nos. 82-1045, vs.

81-1076 and 82-1132

VILLAGE OF MORTON GROVE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
Nos. 81 C 3432, 81 C 4086, and 81 C 5071
Bernard M. Decker, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this case appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 10, 1982

Before

Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. John L. Coffey, Circuit Judge

VICTOR D. QUILICI, ROBERT STENGL, et al,
GEORGE L. REICHERT and ROBERT METLER,
Plaintiffs-Appellants,

Nos. 82-1045, 82-1076 & 82-1132

vs.

VILLAGE OF MORTON GROVE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 81 C 3432, 81 C 4086 & 81 C 5071
Bernard Decker, *Judge*.

O R D E R

IT IS ORDERED, *sua sponte*, that the opinion entered December 6, 1982 in the above appeal be amended as follows:

Page 35, line 8, the word "light" should be changed to read "right."

Appendix E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 2, 1983

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE ESCHBACH, Circuit Judge
Hon. *RICHARD A. POSNER*, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge

VICTOR D. QUILICI, ROBERT STENGL, et al., GEORGE L. REICHERT, and ROBERT E. METLER,
Plaintiffs-Appellants,
Nos. 82-1045, 82-1076 and 82-1132 vs.
VILLAGE OF MORTON GROVE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 81 C 3432, 81 C 4086 and 81 C 5071,
Bernard M. Decker, Judge.

ORDER

On consideration of the petition fro rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the Plaintiffs-Appellants, Victor D. Quilici, Robert Stengl, George L. Reichert and Robert E. Metler, a vote of the active members of the Court was requested, and a majority__*__ of the active members of the Court have been voted to deny a rehearing *en banc*. A majority __*__ of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

__*__ The Hon. Jesse Eschbach and the Hon. John L. Coffey both voted to grant a rehearing *en banc*.

__**__ The Hon. John L. Coffey voted to grant a rehearing.

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

219 South Dearborn Street
Thomas F. Strubbe Chicago, Illinois 60604
Clerk
312-435-5850

March 11, 1983

Mr. H. Stuart Cunningham, Clerk
U. S. District Court
219 South Dearborn Street
Chicago, Illinois 60604

U.S.C.A. #82-1045 VICTOR D. QUILICI,
Plaintiff-Appellant, vs.
U.S.D.C. #81-C-3432 VILLAGE OF MORTON GROVE,
Defendant-Appellee.

U.S.C.A. #82-1076 ROBERT STENGL, et al.,
Plaintiffs-Appellants, vs.
U.S.D.C. #81-C-4086 VILLAGE OF MORTON GROVE, et al,
Defendants-Appellees.

U.S.C.A. #82-1132 GEORGE L. REICHERT,
and ROBERT E. METLER, vs.
U.S.D.C. #81-C-5071 Plaintiffs-Appellants, vs.
VILLAGE OF MORTON GROVE,
Defendant-Appellee.

Dear Clerk:

Herewith is the mandate of this Court in the above-entitled appeal. "A certified copy of the judgment and a copy of the opinion of the Court, if any, and any direction as to costs shall constitute the mandate." (F.R.A.P.41(a)). I am also returning the original record of your District Court, which was transmitted to this office for use on appeal.

Please acknowledge receipt on the enclosed copy of this letter.

Contents of Record

1 vol. pleadings filed 2/16/82,
1 vol. pleadings filed 2/17/82
1 vol. transcripts
1 env. cont. memo
(This completes record on all appeal numbers)
Date:_____

Sincerely yours,
THOMAS F. STRUBBE, Clerk

By: Ann Strong
Deputy Clerk

Received above mandate and record from the Clerk of the United States Court of Appeals for the Seventh Circuit.

_____
Clerk of District Court

Copies mailed to:

Robert Gilbert Johnston, 315 S. Plymouth Ct., Chicago, IL 60604; Victor D. Quilici, 1043 S. York Rd., Bensonville, IL 60106; Thomas P. Sullivan, Jenner & Block, One IBM Plaza, Chicago, IL 60611; Martin C. Ashman, 134 N. LaSalle, Chicago, IL 60602; Don B. Kates, Jr., O'Brien & Hallisey, One California St., Suite 2535, San Francisco, CA 94111; Richard V. Houpt, Pedersen & Houpt, 180 N. LaSalle St., Suite 3400, Chicago, IL 60601; Richard Gardiner, Nat. Rifle Association of America, Inst. for Leg. Action, 1600 Rhode Island Ave., NW, Wash. DC 20036.

Note to Counsel:

If any physical and large documentary exhibits have been filed in the above-entitled cause they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VICTOR D. QUILICI,

Plaintiff,

v.

VILLAGE OF MORTON GROVE,

Defendant.

ROBERT STENGL, et al.,

Plaintiffs,

v.

VILLAGE OF MORTON GROVE, et al.,

Defendants.

GEORGE L. REICHERT, et al.,

Plaintiffs,

v.

VILLAGE OF MORTON GROVE,

Defendant.

Nos. 81 C 3432, 81 C 4086, 81 C 5071 (Consolidated)
Hon. Bernard M. Decker

JUDGMENT ORDER

These consolidated cases were before the Court on plaintiffs' motions for summary judgment and defendants' cross-motion for summary judgment. The motions have been fully briefed by the parties, and the Court has carefully reviewed and considered all arguments set forth in them. The Court being in all respects fully advised and informed,

IT IS ORDERED:

1. Defendants' motion for summary judgment is granted.

2. Each of plaintiffs' motions for summary judgment is denied.

3. Judgment is entered in favor of defendants and against plaintiffs on each and every claim of plaintiffs' complaints.

ENTER:

Bernard M. Decker
United States District Judge

Dated: Dec 29 1981